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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE GRAND JURY PROCEEDINGS
THE BANK OF NOVA SCOTIA.

THE BANK OF NOVA SCOTIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Questions Presented for Review

I. May a neutral non-party witness be held in civil contempt for abiding by foreign criminal laws and judicial decisions barring the production of documents located abroad when an effective alternative means of securing the same documents on a government-to-government basis exists?

II. Is the due process clause of the Constitution violated by the continuation of a daily contempt fine, aggregating $1,825,000, after a non-party witness has substantially completed the production of documents called for by a subpoena *duces tecum*?

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OPINION OF THE COURT BELOW

The final opinion of the United States Court of Appeals for the Eleventh Circuit in this matter, which is not yet officially reported, is reproduced as Appendix A. The final opinion of the United States District Court for the Southern District of Florida is reproduced as Appendix B. An earlier opinion of the Court of Appeals, which remanded this matter to the District Court, is reported at 722 F.2d 657 and appears as Appendix C. Orders of the District Court prior to the remand from the Eleventh Circuit are unreported, and appear as Appendices D through G.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on August 14, 1984. This petition was filed within ninety days of that date. The Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the due process clause of the fifth amendment to the United States Constitution, U.S. Const. Amend. V, which is reproduced as Appendix H. It also involves the provisions of the Federal Rules of Civil and Criminal Procedure relating to subpoenas and contempt, Fed. R. Civ. P. 17, Fed. R. Crim. P. 42 and 45, which are reproduced at Appendices I through K. The Cayman Islands Confidential Relationships (Preservation) Law (1976), *as amended* by the Confidential Relationships (Preservation) (Amendment) Law (1979), is a foreign statute essential to the consideration of this case, and appears as Appendix M.

STATEMENT OF THE CASE

Two distinct issues are presented for review in this case, involving (1) the enforceability of a grand jury subpoena *duces tecum* against a non-party witness who must violate foreign criminal laws and judicial orders to comply with the subpoena, and (2) the punitive use of civil contempt sanctions after the substantial completion of the production of documents called for in a subpoena *duces tecum*.[1]

The Bank of Nova Scotia ("the Bank") is a Canadian chartered bank with more than 1,200 branches, offices and

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1 Although these two issues were raised in separate appeals to the Eleventh Circuit (Nos. 83-5708 and 84-5198), they were ordered consolidated and were considered jointly by the Court of Appeals.

agencies in Canada and more than 45 other countries. Each office is licensed by and operates in accordance with the law of the jurisdiction in which it is located.

On March 4, 1983, the Bank's agency in Miami, Florida, was served with a grand jury subpoena *duces tecum*, issued by the United States District Court for the Southern District of Florida. The subpoena called for the production in Miami of documents located at the Bank's branches in the Commonwealth of the Bahamas, in the Cayman Islands and in Antigua. The documents sought were any and all records relating to accounts and transactions of four corporations and two individuals at those foreign branches during a six-year period commencing in 1976. During that period the Bank maintained ten branches in the Bahamas, one in the Cayman Islands, and one in Antigua.

Following receipt of the subpoena, the Bank's Miami agency promptly advised the branches in the Bahamas, Cayman Islands and Antigua of the service and requirements of the subpoena. Vol. II, tab D.[2] In searches shortly thereafter, records responsive to the subpoena were located in the Bahamas and the Cayman Islands. No responsive records were located in Antigua.

A. Facts Regarding Enforcement of the Subpoena

Bahamian and Cayman statutes prohibit production of banking records located in those countries, unless such production or disclosure is authorized by a court or other competent governmental authority, or by a bank's customer.[3] *See* Appendices L (Bahamian statute) and M (Cayman statute). Judicial

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2 Citations in this form are to the two volume Record Excerpts to the Record on Appeal filed with the Eleventh Circuit.

3 In this case, the U.S. Attorney expressly requested the Bank not to inform its customers of the existence of the subpoena. Vol. II, tab E, ex. 8.

or other governmental authorization is available only upon submission to the appropriate authorities of a statement of the specific purpose for which the documents are sought, together with a showing of their relevancy. Violation of either the Bahamian or Cayman law is a criminal offense punishable by fine and imprisonment. *See* Appendices L at 2l and M at 7m.

After receiving the subpoena, the Bank promptly advised the U.S. Attorney of the relevant foreign statutes, the procedures required to obtain authorization to comply with the subpoena, and the Bank's desire to cooperate in any lawful manner in the production of the documents. Vol. II, tab E, ex. 9. The Bank had no information that would enable it to make the showing required by Bahamian or Cayman law.

Following the U.S. government's refusal to explore alternative methods of obtaining the documents, or to provide the Bank with meaningful information that would enable it to make the showing required in the Bahamas and the Cayman Islands for leave to comply with the subpoena, the Bank made a motion to quash in the district court, on April 4, 1983. By order dated April 27, 1984, the district court, while declining to quash the subpoena, extended the date for production to May 31, 1983, and directed the government to provide the Bank with all assistance, short of seeking letters rogatory, in its efforts to obtain foreign governmental permission to comply with the subpoena.[4] *See* Appendix G.

Even minimal assistance from the government was not forthcoming.[5] Nevertheless, the Bank took every reasonable

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4 The district court order provided:

> Because the government may very well be able to assist the Bank in obtaining the documents, the government will be required to provide any reasonable assistance, especially in dealing with the foreign governments; however, the government is not required to forward letters rogatory.

Appendix G at 2g.

5 In response to the district judge's inquiry as to the assistance provided to the Bank pursuant to the April 27 order, an assistant U.S. attorney responded, "We have provided nothing." Vol. I, tab E at 24.

effort to produce the documents in a lawful manner. The Bank's efforts to comply included petitioning the Grand Court of the Cayman Islands for permission to produce the documents. On May 31, 1983, the Grand Court denied that petition, and enjoined the Bank from producing the documents. However, the Grand Court granted leave to renew the application upon a showing that the documents related to an act, such as trafficking in narcotics, recognized as criminal in both the Cayman Islands and the United States. *See* Appendix N.

But unknown to either the Bank or the district court, although clearly known to the government, the Cayman and United States governments had previously negotiated a direct government-to-government procedure for providing assistance to U.S. law enforcement agencies seeking records from the Cayman Islands. Vol. II, tab L, exs. 2-A, 2-B, 2-C. The government never explored the use of the agreed procedures in this case, nor did it advise the district court or the Bank of their existence. Vol. II, tab O. However, it was established before the district court, through representations by the Cayman Islands, as *amicus*, and testimony of a Cayman lawyer, that use of the government-to-government method provided in the agreed procedures would have resulted in the lawful release of the Cayman documents sought from the Bank. *See* Vol. II, tab B at 85.

On June 1, 1983, the Bank again applied to the district court for relief. The district judge left that motion undetermined for more than four months, until October 10, 1983, when he ordered the Bank to comply with the subpoena by October 17, or face a contempt hearing on October 21. *See* Appendix F. That order was not appealable. As the Bank was still barred by both Bahamian and Cayman criminal statutes from producing the documents, the Bank could not do so. At the hearing, the district judge found the Bank in contempt for its refusal to produce documents in violation of foreign criminal laws and a court order. The district court imposed a fine of $25,000 a day, to begin on October 26 and to continue until the Bank complied with the subpoena or until the grand jury expired. *See* Appendix E.

The Bank appealed. The district court judge denied the Bank's motion for a stay pending appeal. The court of appeals granted a stay on October 25, 1983, but on the government's motion vacated the stay and reimposed the fine effective at noon on November 14, 1983. Justice Powell denied the Bank's application for a stay pending the hearing and determination of the Bank's appeal. That appeal was not heard until December 12, 1983.

On Friday, November 11, 1983, the Attorney General of the Bahamas issued a ruling that the documents then known to the Bank to be responsive to the subpoena were not covered by the Bahamian privacy statute, and could lawfully be produced in response to the subpoena. The Bank delivered those documents to the government on the morning of Monday, November 14, 1983, prior to the time the contempt fine began to accrue. Vol. II, tab R.[6]

On November 17, the Bank was authorized to produce the Cayman documents, as the result of an extraordinary and unprecedented ruling by the Governor of the Cayman Islands. In granting that authority, the Governor relied on a previously unused section of the Cayman statute, *see* § 3(2)(b)(iv), Appendix M at 4m, which provides that the Governor may exempt certain information from the scope of the statute. The Bank immediately produced all responsive documents from the Cayman Islands, three days after the contempt fine began to accrue. Vol. II, tab S.

After receipt of *amicus curiae* briefs from the governments of Canada, the United Kingdom, and the Cayman Islands, as well as the Canadian Bankers' Association, the court of appeals heard oral argument on December 12. On December 28, the court of appeals remanded the case to the district court for

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6 Accordingly, matters relating to the Bahamian financial privacy laws are not at issue in this matter. *See* section 10, The Banks and Trust Companies Regulation Act of the Bahamas (1965), *as amended*, reproduced as Appendix L.

consideration of relevant information not before it, including the views of the *amici* and the facts regarding the government-to-government procedure established between the United States and the Cayman Islands. The hearing on remand was held by the district court on February 14, 1984, and the district court judge rendered his report to the court of appeals on February 28, 1984. *See* Appendix B.

B. Facts Regarding Production of Documents

At the time the contempt fine against the Bank became effective on November 14, the sole issue that had been before the district court with respect to the Bank's compliance with the subpoena related to the significance of the prohibitions of foreign law. No question about the Bank's diligence in conducting the physical search for documents had ever been raised. On November 14, the Bank produced all of the Bahamian documents responsive to the subpoena found by the Bank's Bahamian personnel in the course of several prior searches of the ten Bahamian branches. *See* Vol. II, tab B at 34-7, 59. And on November 17, the Bank produced all of the responsive documents from the Cayman Islands.

Shortly after the production of the Cayman documents, which completed the production of all documents then known to the Bank to be responsive to the subpoena, an assistant U.S. attorney advised the Bank's counsel that additional documents existed. He declined to provide any identification of those documents. The Bank thereupon dispatched from its head office a special search team, supervised by a senior inspector, to conduct new searches of the Bank's Bahamian, Cayman Islands and Antigua branches. Vol. II, tab B at 38-9. No additional documents were located in the Cayman Islands or Antigua branches. Vol. II, tab B at 34. In the Bahamas the special inspection team discovered certain additional documents at two of the ten Bahamian branches, the bulk of which were found in a mislabeled box. Vol. II, tab B at 41. Over 10,000 boxes of documents exist in the Bank's Bahamian

branches. Vol. II, tab B at 34. Bank personnel spent approximately 975 hours searching for documents responsive to the subpoena. Vol. II, tab B at 60. The newly discovered documents were produced to the government on December 5, 1983. Vol. II, tab B at 43. No objection was made as to the completeness of that production.

Following completion of the additional searches, the senior inspector in charge of the inspection team returned to Miami to be available to testify with respect to the Bank's documents. Vol. II, tab B at 44-6. On January 24, 1984, prior to the hearing on remand, the senior inspector appeared before the grand jury to authenticate the documents produced by the Bank in response to the subpoena. In the course of preparing for that appearance, he located four fanfold carbon copies of Bahamian documents that had previously been produced. Vol. II, tab B at 45-7. Those four copies were produced immediately. The Eleventh Circuit noted that the four copies differed from the previously produced documents only in having certain "different markings." *See* Appendix A at 9a n.8.[7] The uncontested testimony before the district court was that the "markings" imparted no information not previously provided to the grand jury by the Bank. Vol. II, tab B at 49-50.

Contemporaneously with the remand proceedings in the district court, by which time all of the documents had been produced, the government moved for judgment against the Bank in the amount of $1,825,000. That amount was calculated by multiplying the daily fine of $25,000 by the number of days that elapsed between the date fixed for commencement of the fine (November 14, 1983) and the date when the four carbon copies were produced by the Bank (January 25, 1984). The district court granted judgment for the full amount

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7 The Eleventh Circuit opinion creates the impression that documents other than the four carbon copies were produced by the Bank for the first time on January 25. Appendix A at 9a. In fact, the only document produced on January 25 other than the four carbon copies was the original of a document previously produced by the Bank in photocopy form. *See* Vol. II, tab B at 50.

claimed by the government. The Bank's appeal from that judgment was consolidated with the pending appeal from the district court's order enforcing the subpoena and holding the Bank in contempt.

The court of appeals disposed of both appeals in a single opinion rendered on August 14, 1984, which so intertwines the two issues as to obscure the rationale of its decision. By this petition, the Bank seeks review of and relief from both elements of that decision.

REASONS FOR GRANTING THE WRIT

The decision below is a grossly unfair departure from the rule of law. In the context of an actual and serious controversy, the case presents questions of federal law that have not been, but which should be, and can only be, answered by this Court. Those questions are of Constitutional magnitude and implicate as well issues of international law that urgently require resolution. Enforcement of the subpoena and imposition of the sanctions applied by the court below is clearly in conflict with the decision of this Court in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958) (hereinafter "*Rogers*"), and with the decisions of courts of appeal in other circuits.

A. Enforcement of the Subpoena and Coercion of Criminal Acts

1. The Importance of the Question

The fundamental question raised by this case is whether the lawful presence in the United States of a foreign business entity justifies the coercion of that entity, through the enforcement of a subpoena and the imposition of the contempt sanction, to violate the domestic criminal laws and judicial orders of a friendly foreign nation. This is a question of great current significance for the United States, its allies and trading partners, and for multinational business enterprises, in view of the

vastly increased internationalization of world business, as well as the increasing frequency with which U.S. law enforcement authorities are seeking to compel the production of documentary and testimonial evidence from abroad. Interpretation of the applicable principles of law requires the attention of this Court.

Cases of this type—in which a disinterested business entity, generally a financial intermediary, is present somewhere in the United States and is served with a grand jury subpoena or similar process requiring the production of documents located at a non-U.S. office—have become almost commonplace.[8] However, as many countries prohibit the removal of business records or the disclosure of customer information, such a subpoena places the recipient in a dangerous dilemma: resist the subpoena or violate the foreign law. In turn, this threatened violation of foreign law, perceived to be compelled by a United States court, both angers the foreign sovereign[9] and precipitates countermoves.[10] Indeed, the reporters' notes to the tentative draft of the revised *Restatement* observe:

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8 *Garpeg, Ltd. v. United States*, No. 84 Civ. 0437 (S.D.N.Y. July 10, 1984); *In re Grand Jury Proceedings. United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 3086 (1983); *United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983); *In re Grand Jury 81-2*, 550 F. Supp. 24 (W.D. Mich. 1982); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981).

9 Three governments—those of Canada, the Cayman Islands, and the United Kingdom—participated actively as *amici* in support of the Bank in the courts below.

10 Some countries have adopted statutes designed expressly to frustrate U.S. discovery efforts. *See, e.g.*, [1980] Journal Officiel de la Republique Francaise 1799, Law No. 80-538; Protection of Trading Interests Act (1979) (United Kingdom); *cf.*, the great number of signatories to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. 7444, which have taken exception to the pre-trial discovery provisions, including the Federal Republic of Germany, Italy, the Netherlands, Norway, Portugal, Singapore, Switzerland, and the United Kingdom.

> No aspect of the extension of the American legal system beyond the territorial frontiers of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States.

Restatement (Revised) of Foreign Relations Law of the United States § 420 reporters' notes at 18 n.1 (Tent. Draft 3, 1982).

An effective alternative to the legal warfare precipitated by resort to costly subpoena enforcement is a direct government-to-government mechanism, such as the Cayman Islands-United States procedures that were available, although eschewed, in this case.[11] The existence of such direct mechanisms raises a related and important question of Constitutional due process: may a neutral non-party witness be placed in contempt for abiding by foreign criminal laws and judicial decisions barring the production of documents located abroad, when an effective alternative means of securing the same documents on a government-to-government basis exists?

2. The Conflict with Applicable Decisions of this Court

The decision by the court of appeals disregards prior decisions of this Court that recognize the importance that the prohibitions of foreign law have with respect to international discovery efforts. This Court has consistently recognized that prohibitions of foreign law constitute a "weighty excuse" for nonproduction of documents. In *Rogers*, 357 U.S. 197 (1958),

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11 The governments of the United States and the Cayman Islands have recently concluded another agreement regarding discovery of evidence from the Cayman Islands in narcotics cases. *Exchange of Letters Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the Cayman Islands and matters connected with, arising from, related to, or resulting from any narcotics activity referred to in the Single Convention on Narcotic Drugs, 1961* as amended *by the Protocol Amending the Single Convention on Narcotic Drugs, 1961* (July 26, 1984). Under that agreement, the United States will not seek to enforce subpoenas for Cayman documents in specified classes of cases.

the Court reversed a district court's imposition of sanctions on a party who had in good faith attempted to comply with a discovery order which required a violation of foreign law. Enforcement of the contempt order here conflicts with the solicitude for foreign law reflected in *Rogers*. The Bank, despite its good faith efforts, could not have complied with the order without violating the criminal laws of the Cayman Islands.

The principle enunciated in *Rogers* is reflected in the federal rules of civil and criminal procedure. Under Federal Rule of Criminal Procedure 17(g) and Federal Rule of Civil Procedure 45(f), a person may not be held in contempt if there is "adequate excuse" for failing to obey a subpoena. *See* Appendices J and K; *Rogers*, 357 U.S. at 211 ("fear of criminal prosecution constitutes a weighty excuse for nonproduction"); 28 U.S.C. § 1826(a) (a recalcitrant witness may be confined for refusing to testify or produce documents only if shown to be acting "without just cause"). The Eleventh Circuit has ignored both *Rogers* and the procedural rules adopted under the auspices of this Court.

In *United States v. Ryan*, 402 U.S. 530 (1971), this Court reiterated in dicta the *Rogers* holding that sanctions are improper if the witness has made good faith efforts to comply, but is unable to do so for fear of criminal prosecution abroad. 402 U.S. at 534. The *Ryan* case involved a grand jury subpoena for documents in Kenya. Although Kenyan law on its face prohibited compliance, the district court insisted that the witness apply in Kenya for the release of documents. The district court further provided that if the witness' application were denied, the witness would be excused from producing the subpoenaed documents to the grand jury. Further, the government would then be required to proceed in a manner consistent with the Kenyan statute.

Rejecting all concern for foreign laws and the Bank's efforts to comply, the Eleventh Circuit makes success or failure in producing the documents the sole test of whether sanctions should be imposed. While the circuit court concluded that the Bank did not exercise good faith with respect to its efforts to

avoid foreign legal prohibitions, the court's only specific criticism was to note that the Bank did not appeal the Cayman Court order denying the Bank's application. Appendix A at 4a. Good faith, however, does not require a party to undertake a fruitless act. First, the Bank's application was denied without prejudice and with leave to reapply. The Bank in fact reapplied. *See* Appendix N. Second, an appeal would clearly have been pointless. Without the cooperation of the U.S. government, the Bank was unable to furnish the Cayman court with the information required under the statute. The Bank also lacked any basis on which to challenge the Cayman legal standard for releasing bank records. The circuit court's criticism was wholly unjustified.[12]

Not only does the Eleventh Circuit reject the *Rogers* holding, but it purports to adopt a balancing test that has never been reviewed, sanctioned or applied by this Court, and has been criticized by many authorities. The Eleventh Circuit, as well as other circuit and state courts, uses section 40 of the *Restatement (Second) of Foreign Relations Law of the United States* (1965) as the exclusive test in extraterritorial discovery cases, although it has been faulted as not adequately considering the underlying policies of foreign states. *See* Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*. 50 Fordham L. Rev. 877, 900 (1982); Note, *Foreign Nondisclosure Laws and Domestic Orders in Antitrust Litigation*, 88 Yale L.J. 612, 621 (1979). Both federal and state courts would benefit from this Court's evaluation of that test.[13]

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12 This case is distinguishable from *In re Grand Jury Proceedings. United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 3086 (1983), where the witness had not made efforts abroad, and, therefore, failed to act in good faith as a matter of law. In the present case, however, the Bank, acting in light of *Twist*, made meaningful efforts abroad to secure the lawful release of the documents and did produce them.

13 Not all lower courts use the § 40 *Restatement (Second)* test. *See United States v. Toyota Motor Corp.*, 569 F. Supp. 1158, 1162 (C.D. Cal. 1983), which has adopted § 420 of the *Restatement (Revised)*.

(footnote continued)

3. The Conflict of Decisions by the Circuit Courts

The Eleventh Circuit decision presents a conflict with holdings of several other circuits which should be resolved by this Court. For example, in *United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983), the district court imposed sanctions on a non-party bank witness who refused to violate Greek privacy laws by producing documents from its branch in Greece. The Seventh Circuit, noting the vital interests of Greece in maintaining the integrity of its financial system through the bank secrecy statute, reversed the lower court order. The government did not seek review of that decision.

The Eleventh Circuit decision in the present case is also at odds with Second Circuit holdings. In *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962), the Second Circuit modified a subpoena issued to the Chase Manhattan Bank that required the disclosure of documents located in Panama in violation of that country's laws. The Second Circuit, rather than coerce the violation of foreign law by a non-party witness, placed the responsibility with the U.S. government to obtain the documents through negotiations with the Panamanian government. The Second Circuit stated:

The circuit court also misapprehended the teaching of this Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). The separation of powers doctrine, a "constitutional underpinning" of the act of state doctrine, proscribes use of the judiciary to implement foreign policy, just as it proscribes encroachment by the judiciary on the foreign policy prerogatives of the executive branch. That principle is violated when, as the record in this case indicates, the executive seeks to use judicial power as a tool to achieve a political objective, such as the alteration or subversion of domestic law in friendly foreign countries. *See* Vol. I, tab K at 38 (suggestion of assistant U.S. attorney that enforcement of the subpoena would cause the Bahamian government to "rethink" their policies); *U.S. v. First National City Bank*, 379 U.S. 378, 401 (1965) (Harlan, J. dissenting opinion); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773 (1972) (Douglas, J. concurring opinion).

> Just as we would expect and require branches of foreign banks to abide by our laws applicable to the conduct of their business in this country, so should we honor their laws affecting our bank branches which are permitted to do business in foreign countries.

297 F.2d at 613.

Similarly, in *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960), the Second Circuit refused to enforce a subpoena against the Bank of Nova Scotia requiring the production of records located in Canada. Observing that an agreed procedure between the United States and Canada existed for the release of documents in Canadian banks, the court held:

> Upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures.

282 F.2d at 152.[14]

The intervention of this Court is necessary to harmonize the conflicting decisions of the circuits.

4. The Departure from the Accepted and Usual Course of Judicial Proceedings

The import of the decision below is that a non-party witness, served with a grand jury subpoena, must promptly and without

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14 As the Eleventh Circuit points out, the circuits are also in conflict as to whether the U.S. government, in appropriate circumstances, should be required to demonstrate the relevancy and materiality of information sought by a grand jury subpoena. *See* Appendix A at 13a n.12; *compare In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85 (3rd Cir. 1973); *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963 (3rd Cir.), *cert. denied*, 421 U.S. 1015 (1975) (imposing a requirement that the U.S. Attorney demonstrate relevancy and necessity with respect to grand jury subpoenas) *with In re Grand Jury Proceedings. United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 3086 (1983) (refusing to adopt a requirement of relevancy); *In re Pantojas*, 628 F.2d 701 (1st Cir. 1980), *In re Liberatore*, 574 F.2d 78 (2d Cir. 1978).

hesitation violate the criminal laws of friendly foreign sovereigns, if that is what compliance with the subpoena might require. The threat of imprisonment, fines, and other sanctions that may befall the non-party is to be ignored.[15] Further, the non-party witness is required to commit such violations notwithstanding the ready availability to the government of an effective alternative means for securing exactly the same materials without precipitating a breach of foreign law. The solicitation to international lawlessness established in the district and circuit court decisions is entirely antithetical to the accepted and usual course of judicial proceedings established by this and other courts.

The Eleventh Circuit has renounced the established standard of good faith with respect to a witness' efforts to comply with extraterritorial subpoenas, simply ignoring the "weighty excuse" to nonproduction that the fear of criminal prosecution provides. *See Rogers*, 357 U.S. at 211; Fed. R. Crim. P. 17(g), Appendix J; Fed. R. Civ. P. 45(f), Appendix K. While disregarding these established landmarks, the decisions below furnish no guidance to neutral witnesses, prosecutors or courts as to the proper relationship between the enforcement of domestic subpoenas and the conflicting mandates of foreign criminal laws. Accordingly, the intervention of this Court is essential.

B. Punitive Fine and Production of Documents

1. The Importance of the Question and the Departure from the Accepted and Usual Course of Judicial Proceedings

A contempt fine of $1,825,000 has been imposed on the Bank, based on seventy-three days of an alleged civil contempt at $25,000 per day. As a civil contempt necessarily rests on the validity of the underlying order, the invalidity of the enforce-

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15 In another case with nearly identical facts, the Eleventh Circuit has demonstrated more concern for the interests of non-party witnesses and their exposure to criminal liability in other jurisdictions. *United States v. Ghidoni*, 732 F.2d 814 (11th Cir.), *cert. pet. filed*, No. 84-270 (U.S. Aug. 6, 1984).

ment order in this case requires that the civil contempt and the resulting fine be vacated. Even assuming the validity of the enforcement order, the assessment of contempt fines in this case so far departs from the accepted and usual course of judicial proceedings as to require this Court's review.

The first three days for which the fine was assessed covers the period after the Bank had commenced the production of Bahamian documents, but before the bar of Cayman criminal law had been lifted. The balance of the fine relates only to the period during which the Bank was producing documentary evidence to the grand jury from the Bahamas. On December 5, document production by the Bank was substantially complete, by which time $525,000 in fines had accrued. The remaining fine, of $1,300,000, is based solely on the period between the Bank's substantially complete production of Bahamian documents on December 5 and the Bank's later production, on January 25, of four carbon copies of documents previously produced. Contempt fines in that magnitude are purely punitive and cannot be sustained.

It is an elementary principle that the purpose of an order of civil contempt is coercive, and that such contempt terminates when the court's order is obeyed. *Shillitani v. United States*, 384 U.S. 365 (1966). Civil contempt therefore differs materially from criminal contempt, which has the purpose of punishment. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911). A witness accused of criminal contempt is entitled to substantial Constitutional due process rights, including the right to notice and a hearing. *See* Fed. R. Crim. P. 42(b), Appendix I; 18 U.S.C. § 401; *In re Stewart*, 571 F.2d 958 (5th Cir. 1978)(contempt fines which are in part remedial and in part punitive are regarded as criminal for purposes of due process).

In this case, the district court's order of contempt was clearly intended to be remedial, and imposed to coerce the Bank to end its assertion of the bar of foreign criminal law as an excuse for non-compliance with the subpoena. At the time of the district court's order of contempt, the issue of the

completeness of the Bank's search had not arisen. Accordingly, the Bank complied with the contempt order when it stopped asserting the prohibition of foreign law, which it did when it produced the Cayman documents on November 17. Even assuming that the contempt order was properly issued, the contempt fine should terminate at the time when the Bank had produced both Bahamian and Cayman documents.

If the civil contempt order is construed to have a broader purpose—to coerce the Bank not only to produce documents notwithstanding foreign legal prohibitions, but to complete the production of evidence to the grand jury—that purpose was also achieved well before the fine reached the $1,825,000 calculated by the district court and the Eleventh Circuit. By December 5, the Bank had produced all documents, except for the four carbon copies.[16] By that date, the government, the district court and the Bank had no reason to believe that any of the Bank's evidence had not been produced. The coercive purpose of the contempt had been fulfilled, and the Bank had produced all of the documents it reasonably believed to exist. Additional fines could not coerce the Bank, but only punish it. The four carbon copies produced on January 25 (for which an additional $1,300,000 in fines was assessed) differed from previously produced items only in bearing certain "different markings." *See* page 8, *supra*; Appendix A at 9a n.8. The uncontested testimony below was that those markings imparted *no* new information.

By any standard, the purpose of the civil contempt was achieved not later than December 5. The fines assessed after that date are punitive. As the Bank did not receive the procedural due process accorded for criminal contempt, the entire contempt fine must be vacated. This Court should exercise its supervisory powers to ensure that lower courts do not obscure the distinction between civil and criminal contempt, and thereby deprive litigants of their Constitutionally guaranteed due process rights.

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16 *See U.S. v. Rizzo*, 539 F.2d 458 (5th Cir. 1976) (subsequent production of responsive documents does not prolong civil contempt beyond earliest date of good faith effort to comply with discovery demand).

CONCLUSION

This petition for certiorari should be granted and, upon review, the decisions of the court of appeals and the district court should be reversed.

Dated: New York, New York
August 31, 1984

Respectfully submitted,

/s/ Henry Harfield

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APPENDIX A

Opinion of the
United States Court of Appeals
for the Eleventh Circuit

IN RE: GRAND JURY PROCEEDINGS
THE BANK OF NOVA SCOTIA.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THE BANK OF NOVA SCOTIA,

Defendant-Appellant.

Nos. 83-5708, 84-5198

United States Court of Appeals,
Eleventh Circuit.

August 14, 1984.

Appeals from the United States District Court for the Southern District of Florida.

Before FAY and ANDERSON, *Circuit Judges*, and BOYLE*, *District Judge*.

FAY, *Circuit Judge*:

This case is an appeal by the Bank of Nova Scotia ("The Bank"), of an order of civil contempt and the imposition of a

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* Honorable Edward J. Boyle, Sr., U. S. District Judge for the Eastern District of Louisiana, sitting by designation.

$1,825,000 fine entered by the United States District Court for the Southern District of Florida. On numerous occasions the district judge ordered the Bank to comply with a grand jury subpoena *duces tecum*. The Bank continuously disregarded the court's orders. The district judge concluded that the Bank did not act in good faith and found it in contempt of court. He imposed a $25,000 per day fine for as long as the Bank did not comply with the subpoena. The Bank challenges the order on various diplomatic and legal grounds. After a careful review of the record we conclude that the district judge was extremely patient. He did not abuse his discretion in finding the Bank in contempt of court and imposing the fine.

I. *FACTS*

The Bank of Nova Scotia is a Canadian banking corporation, headquartered in Toronto, with over 1,200 branches, offices and agencies in forty-six countries. On March 4, 1983, the Bank's Miami office was served with a grand jury subpoena *duces tecum* issued by the United States District Court for the Southern District of Florida. The subpoena called for the production of financial documents pertaining to two individuals and three companies from the Bank's branches in the Bahamas, the Cayman Islands and Antigua.[1] On March 22, 1983, the Bank's Miami office sent telexes to the Bahamian and Cayman branches informing them of the subpoena and asking them to search for the requested documents. The Bank produced no documents at its March appearance before the grand jury. On April 4, 1983, the Bank filed a motion to quash in the district court asserting that if it complied with the subpoena it would violate the secrecy laws of the Bahamas and

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1 The Bank investigated and found none of the requested documents at its Antigua branch. Therefore, that part of the subpoena is not at issue. The individuals and corporations named in the subpoena are Frank Brady, Paula Brady, Frank J. Brady Enterprises, Inc., Brady Farms, Inc., and Clay Island Farms, Inc.

the Cayman Islands.[2] The court denied the motion and ordered the Bank to produce the documents by May 31, 1983.

During the month of May the Bank made no effort to comply with the court's order by searching for the subpoenaed documents. Instead the Bank spent its time corresponding through counsel with the Assistant United States Attorney handling the grand jury proceedings. The Bank continuously requested the government to send letters rogatory and to show the materiality and necessity of the subpoenaed documents to the grand jury investigation. The government repeatedly stated that it was willing to provide any requested assistance, short of showing materiality and necessity or sending letters rogatory.

The only other effort by the Bank during the month of May to comply with the district court's order was the filing of a petition before the Grand Court of the Cayman Islands for permission to disclose the documents sought in the subpoena. The Grand Court denied the petition on May 31, 1983, but granted the Bank leave to renew it at a later date. The Court

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2 The relevant section of the confidentiality law of the Cayman Islands reads as follows:

> 3A. (1) Whenever a person intends or is required to give in evidence in, or in connection with, any proceeding being tried, inquired into or determined by any court, tribunal or other authority (whether within or without the Islands) any confidential information within the meaning of this Law, he shall before so doing apply for directions and any adjournment necessary for that purpose may be granted.
>
> (2) Application for directions under subsection (1) shall be made to, and be heard and determined by, a Judge of the Grand Court sitting alone and *in camera*. At least seven days' notice of any such application shall be given to the Attorney General and, if the Judge so orders, to any person in the Islands who is a party to the proceedings in question. The Attorney General may appear as *amicus curiae* at the hearing of any such application and any party on whom notice has been served as aforesaid shall be entitled to be heard thereon, either personally or by counsel.

Section 3A(1)-(2) of the Confidential Relationships (Preservation) Law of 1976 (as amended in 1979).

The Bank concedes, on page eight of its supplemental brief, that the Attorney General of the Bahamas authorized the Bank to release the documents prior to the time the contempt sanction became effective. Thus, the Bahamian documents "are not at issue in this appeal."

further ordered the Bank not to produce the subpoenaed documents. The Bank never appealed this order to the Court of Appeals in Jamaica.

On June 1, 1983, the Bank filed another motion for relief from the subpoena in the district court. The court denied the motion on October 10, 1983, and ordered the Bank to comply with the subpoena by October 17, 1983, or face a contempt hearing on October 21, 1983. The Bank's only effort to locate any documents either in the Bahamas or in the Caymans between the June first motion and scheduled October hearing was a search conducted in Nassau on October 14, 1983, which produced no documents. The only document produced by the Bank during this seven month period was a xerox copy of a draft[3] drawn to Paula Brady by the branch in Nassau for $163,892.33. At the hearing the district court concluded the Bank had not made a good faith effort to comply with the subpoena and found it in contempt. The court imposed a fine of $25,000 per day, beginning on October 26, 1983, and continuing until the Bank complied with the subpoena or the grand jury expired. We stayed the fine from October 25, 1983 until November 14, 1983.

On November 11, 1983, the Attorney General of the Bahamas issued an order allowing the Bank to produce the requested documents. He concluded that since the Bahamian branch did not have an account relationship with the subjects of the subpoena the dealings of the parties in the Bahamas were not protected by the Bahamian bank privacy statute. On November fourteenth, just prior to the lifting of the stay of the $25,000 per day fine imposed by the district court, the Bank delivered the following documents from its Bahamian branches:

Copies of the following Certificates of Deposit:

a) CD 6511601 issued on March 2, 1979, for $50,000 payable to Paula or Frank Brady.

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3 A draft in the Bahamian islands is the same thing as an American cashier's check.

b) CD 6511799 issued on March 2, 1979, for $50,000 payable to Paula or Frank Brady.
c) CD 6511800 issued on March 2, 1979, for $50,000 payable to Paula or Frank Brady.

Draft requisition dated November 8, 1982, by Paula Brady drawn on Manufacturer's Hanover in New York for $163,892.33.

Nassau branch copy of the draft requisition of November 8, 1982.

Receipt dated November 8, 1982, signed by Paula Brady.

After this disclosure the Assistant United States Attorney insisted that there were Bahamian documents still missing. The Bank reiterated that all of its branches in Nassau had been searched and there were no other documents in the Bahamas.

On November 11, 1983, the Grand Court of the Cayman Islands reconsidered the issue of disclosure and again refused to permit the Bank to disclose the records. However, the Governor of the Islands, pursuant to Section 3(2)(b)(iv) of the confidentiality statute,[4] authorized the disclosure of the subpoenaed documents on November 17, 1983. The Bank immediately produced all of the documents which had been located at the Cayman branch of the Bank. Once again the Assistant United States Attorney reiterated that a substantial number of documents still had not been produced from the Bahamian branches in spite of the ruling by the Attorney General of the Bahamas permitting disclosure.[5]

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4 Section 3(2)(b)(iv) of the Confidential Relationship (Preservation) Law of 1976 (as amended in 1979) states:

> (2) This law has no application to the seeking, divulging, or obtaining, of confidential information—. . .
>
> (b) by or to . . .
>
> (iv) the Financial Secretary, the Inspector or, in relation to particular information specified by the Governor, such other person as the Governor may authorise; . . . .

5 Of the $1,825,000 fine imposed by the district court, only $100,000 is attributable to the failure to produce records from both the Bahamas

In late November, 1983, Mr. Nicol, the assistant chief inspector for the Bank, was ordered to go to the Bahamas and "insure that [an] effective search had been carried out of the Bank's records in the Bahamas." Mr. Nicol arrived in Nassau on November 24, 1983, and immediately discovered additional documents in two of the Bank's Bahamian branches.[6] As a result of his search photocopies of the following items were turned over on December 5, 1983:

Composite 1: CD 1093134 dated January 11, 1979, for $20,000.
The register copy of this CD.
The diary debit copy showing that it was paid on April 11, 1979.

Composite 2: CD 1093357 dated April 11, 1979, for $20,542.46.
The register copy of this CD.
The auditor's copy of this CD.

Composite 3: CD 1093181 dated January 31, 1979, for $50,000.
The register copy of this CD.

Composite 4: CD 1093300 dated March 20, 1979 for $200,000.
The register copy of this CD.

Composite 5: CD 1093329 dated March 28, 1979, for $150,000.

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and the Cayman Islands. The remainder of the fine is imposed solely because of the failure to produce the Bahamian records until January 25, 1984. There was absolutely no question whatsoever concerning the Bahamian records after November 11, 1983.

6 Mr. Nicol began his search by opening a sealed list of dormant accounts which revealed one of the target names on the subpoena. He noticed that all of the 1979 records appeared to be missing. He then ordered a physical search of the archives room which revealed a box of vouchers with no label. This box held most of the items requested in the subpoena.

The register copy of this CD.
The auditor's copy of this CD.

Composite 6: Draft sold to Paula Brady payable to Brady Farms for $100,000 on January 11, 1979.
Requisition for the draft.

Composite 7: Draft sold to Frank Brady payable to Brady Farms for $200,000 on February 23, 1979.
Requisition for the draft.

Composite 8: Draft sold to Frank Brady payable to Brady Farms for $40,000 on February 23, 1979.
Requisition for the draft.

Composite 9: Draft for $225,000 sold on March 19, 1979, payable to Brady Farms.
Requisition for the draft.

Composite 10: Draft sold to Frank Brady payable to Clay Island Farms for $250,000 sold on April 18, 1979.
Requisition for the draft.
Prior cancelled requisition for the draft.

Composite 11: Draft sold to Frank Brady payable to Calleaders Orr and Company for $170,000 sold on April 18, 1979.
Requisition for the draft.
Prior cancelled requisition for the draft.

The following other items were also produced on December 5, 1983:

Operation of Foreign Currency Deposit Account dated January 11, 1979, signed by Paula and Frank Brady.

Bank Form 702: Current Account document and operating record.

Several checking account statements.

Deposit slip dated March 20, 1979 and a credit memo with the same date.

Deposit slip and credit memo dated April 12, 1979.

Deposit slip and credit memo dated April 18, 1979.

A credit to the bank commission account for $1,191.90 for a handling charge.

Three checking account statement for West Indies Island Tourist Company, LTD.

Checking account statement in the F.N. Bowe "U.S. Dollar" account.

On December 9, 1983, the Assistant United States Attorney informed the Bank that he needed a Bank employee to appear before the grand jury on December 20, 1983, to authenticate all of the documents that had been produced. The government's attorney reminded the Bank that only copies of the documents had been produced and requested that the authentication witness bring the originals. The Bank decided that it would send Mr. Nicol to appear before the grand jury but did not notify him until December nineteenth. As a result of the Bank's delay, his appearance before the grand jury was rescheduled for January 24, 1984.

We heard oral argument on the expedited appeal on December 12, 1983. Since much had transpired during the pendency of the appeal we remanded the case to the district court for further proceedings[7] and retained jurisdiction. *In re Grand Jury Proceedings, United States v. The Bank of Nova Scotia*, 722 F.2d 657 (11th Cir. 1983).

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7 We remanded the case for several reasons. During oral argument the bank asserted that it had fully complied with the subpoena and the government disagreed. We found out there existed a Single Convention on Narcotic Drugs (1961) signed by both the United States and the Cayman Islands and a letter agreement between the officials of both countries that allegedly controlled this situation. Neither of these agreements was brought to the attention of the trial judge. In addition, the views of various *amici*, *i.e.*, the government of Canada, the Canadian Bankers' Association, the United Kingdom of Great Britain and Northern Ireland and the Cayman Islands, were never presented to the district court at the first proceedings.

In January, Mr. Nicol began preparing for his appearance before the grand jury. While reviewing the documents he realized that a number of vouchers were still missing. He once more contacted the Bahamian branches and requested that the boxes of records be searched. On January 23, 1983, the Bank found additional documents in the Bahamas. The following documents,[8] along with the original of the draft produced on October 20, 1983, were delivered on January 25, 1984:

Four vouchers of the CDs redeemed on April 18, 1979.

Cancelled draft 184901 dated November 8, 1982, to Paula Brady for $163,892.33 drawn on the Bank in Nassau and deposited to the F.N.Bowe "U.S. Dollars" account in Nassau.

Diary debits to GL at maturity for:

CD 1093300 in the amount of $220,000
CD 1093329 in the amount of $150,000
CD 1093181 in the amount of $ 50,000
CD 1093357 in the amount of $ 20,542.46

The hearing on remand was held on February 14, 1984. Most of the evidence introduced by the Government at the hearing consisted of affidavits.[9] They also submitted the transcript of Mr. Nicol's appearance before the grand jury. The documentary evidence presented by the government was letters from the Bank's counsel transmitting some of the subpoenaed documents. The government called only one witness, Norman

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8 The Bank asserts that these documents were identical in content to the documents produced by the Bank on December 5, 1983. The vouchers submitted to the government on January 24, 1984, were one copy of a four-part form, but once the form is separated each part acquires different markings on its independent routing through the Bank.

9 Although the Government had all of the witnesses whose affidavits had been submitted to the court present in the courtroom, the Bank chose not to cross-examine any of them.

Washington Hill, a member of the Bar in England, and an attorney in the Cayman Islands since 1970.[10]

The Bank called three witnesses, Mr. Nicol, Mr. Richard John Marshall, an attorney at law in the Cayman Islands, and Mr. Scott McDonald, the vice-chairman of the Bank's Board of Directors. Its documentary evidence consisted of its petitions before the Grand Court of the Caymans, the letters to the branches requesting assistance and a chart comparing the documents produced on December 5, 1983, with those produced on January 25, 1984.

We had ordered the parties to present evidence to the district court of the letter agreement between both countries first mentioned to us during oral argument in December. The Bank introduced these letters, known as the "Gentlemen's Agreement", which reflected the results of a meeting between the Cayman Islands and the United States held in Miami in September, 1982. After the meeting, Acting Governor of the Caymans, D.H. Foster, wrote a letter to Michael Carpenter, the Consul General of the United States in Jamaica, outlining the necessary steps to be followed by the United States when requesting information protected by the confidentiality laws of the Caymans. Requests for assistance would be

> 1) initiated through the office of International Affairs of the United States Department of Justice;
>
> 2) directed to the Cayman Islands Commissioner of Police and supported by documentary evidence and affidavits sufficient to establish that the requests were in connection with inquiries into an offense made criminal by both the laws of the United States and the Cayman Islands, with tax offenses specifically excluded;
>
> 3) received by the Police Commissioner who would first determine whether a *prima facie* case was evident and if so would be referred to a committee consisting of the Attorney General, the Financial Secretary, a senior mem-

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10 Mr. Hill has been employed by the United States Department of Justice since 1982 to represent its interests in the Bahamas.

ber of the police force and an elected member of the Executive Council;

4) examined by that Committee and forwarded with a recommendation to the Governor in Council for presentation to the Council at its next weekly meeting;

5) reviewed by the Governor in Council, and if the recommendation of the Committee were approved, the Governor would authorize the confidential information or records to be obtained for the Governor in Council; and the information

6) forwarded through the Police Commissioner to the United States Office of International Affairs after perusal by the Governor in Council.

Foster predicted the information would be produced within one month of the request.[11] He concluded his letter by saying: "I should be obliged for confirmation that this is your Government's understanding. . . ."

The United States Government never confirmed the agreement. Instead, Deputy Assistant Attorney General, Roger M. Olsen, wrote a letter dated January 11, 1983, to its Excellency, G.P. Lloyd, C.M.G., Governor of the Cayman Islands stating:

> . . . I do wish to reiterate that while we are willing to try out the proposed procedures, the United States retains the option of relying on other legal processes available to us in gathering evidence. Such processes include our seeking the issuance of orders from our own courts commanding the production of evidence from persons or institutions in our territory.
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> . . . [W]e do have several reservations about whether the proposed procedures satisfactorily address both our Governments' needs.

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11 John Harris stated in his affidavit that "no bank records have ever been received in any case by the United States in the fourteen months that the informal agreement has been under experiment. . . ."

In response to Mr. Olsen's letter, Governor Lloyd wrote a letter to Mr. Carpenter on March 15, 1983. The Governor stated that "even though no confirmation had been received from your Government as to the agreed procedures, they would be implemented by us."

The *amici* all filed extensive briefs with the district court. At the hearing they very briefly presented their views to the court on the diplomatic ramifications of the case. *Amici* offered no evidence whatsoever. On February 28, 1984, the district court issued its order, reaffirming its conclusion that the enforcement of the grand jury subpoena was proper and that the Bank had not acted in good faith. The court found the total fine due and owing the United States to be $1,825,000.00.

The Bank challenges the district court's contempt order by claiming that it made a good faith effort to comply with the court's orders in its search for the requested documents. It also asserts that both the diplomatic agreements between these countries and the act of state doctrine require reversal of the court's contempt order and fine. We disagree.

II. *PRODUCTION OF DOCUMENTS*

A. Lack of Good Faith

The Bank of Nova Scotia was served with a subpoena from the grand jury on March 4, 1983. The Bank produced no documents at its March appearance before the grand jury and instead moved to quash the subpoena. The district court gave the Bank two months to search for the documents and ordered production by May 31, 1983. Instead of trying to comply with the district court's order during this time the Bank spent most of its time corresponding through counsel with the Assistant United States Attorney handling the case. The Bank insisted that the government send letters rogatory and show the materiality and necessity of the requested documents to the investigation. Neither of these is a prerequisite to the enforcement of a grand jury subpoena in our legal system.

Under our system of jurisprudence the grand jury's function in investigating possible criminal violations is vital. In re

Grand Jury Proceedings, United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), *cert. denied sub nom*, Bank of Nova Scotia v. United States, ____ U.S. ____, 103 S.Ct. 3086, 77 L.Ed.2d 1348 (1983); In re Grand Jury Proceedings, United States v. Field, 532 F.2d 404 (5th Cir. 1976), *cert. denied*, 429 U.S. 940, 97 S.Ct. 354, 50 L.Ed.2d 309 (1976). The Supreme Court has stated that the grand jury's authority to subpoena witnesses is not only historic, *id.*, at 279-281, but essential to its task." Branzburg v. Hays, 408 U.S. 665, 688, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626, 643 (1972). Since the ability to obtain evidence is crucial to all criminal justice proceedings, courts have repeatedly allowed the grand jury wide discretion in seeking evidence. *See*, United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973).

It would be extremely unwise for us to unduly restrict the broad investigatory powers of the grand jury by first requiring that the government show necessity or issue letters rogatory. Letters rogatory are not equivalent to a grand jury subpoena. *See*, United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir. 1981). We have clearly stated that the government is not required to show the relevancy of the requested documents to a grand jury investigation,[12] In re Grand Jury Proceedings, United States v. Bank of Nova Scotia, 691 F.2d at 1387; In re Grand Jury Proceedings, United States v. Guerrero, 567 F.2d 281 (5th Cir. 1978); In re Grand Jury Proceedings, United States v. McLean, 565 F.2d 318 (5th Cir. 1977),[13] and we have repeatedly

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12 We are all aware that the Third Circuit in its holdings in In re Grand Jury Proceedings, (Schofield I) 486 F.2d 85 (1973) and In re Grand Jury Proceedings, (Schofield II), 507 F.2d 963, *cert. denied*, 421 U.S. 1015, 95 S.Ct. 2424, 44 L.Ed.2d 685 (1975) has imposed a relevancy requirement but we have already stated that we refuse to impose such a restriction. In re Grand Jury Proceedings, United States v. Bank of Nova Scotia, 691 F.2d 1384, 1387 (11th Cir. 1982). We join the other circuits that have declined to adopt such a rule. *See, e.g.*, In re Pantojas, 628 F.2d 701 (1st Cir. 1980); In re Liberatore, 574 F.2d 78 (2d Cir. 1978).

13 Decisions of the former Fifth Circuit rendered prior to October 1, 1981, are binding upon this court unless and until they are overruled by

declined requests to overturn this rule. In re Grand Jury Proceedings, United States v. Nigel Bowe, 694 F.2d 1256, 1258 (11th Cir. 1982); In re Slaughter, 694 F.2d 1258, 1260 (11th Cir. 1982). As noted by the Supreme Court:

> Any holding that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.

United States v. Dionisio, 410 U.S. at 17, 93 S.Ct. at 773.

The district court correctly concluded that the Bank failed to exercise good faith in its efforts to comply with the subpoena. All the Bank tried to do in this case was to obtain from the government what it was clearly not entitled to receive; a showing of materiality and necessity and the issuance of letters rogatory. The district court specifically ruled that letters rogatory were not required yet the Bank continued to write to the prosecutor requesting him to send letters rogatory. Nothing was substantially done by the Bank until the $25,000 per day fine imposed by the district court started to accumulate.

The documents actually produced at different times virtually speak for themselves in showing lack of good faith. On October 20, 1983, seven months after the grand jury subpoena had been served, the only document produced by the Bank was a xerox copy of a draft drawn to Paula Brady for $163,892.33. The Assistant United States attorney advised Bank's counsel that there were many more documents in existence which were responsive to the subpoena. Nevertheless, the Bank blithely ignored these warnings and on November 14, 1983, tendered copies of the documents relating to that one transaction as the only records in the Bahamian branches called for by the subpoena. The prosecutor once more warned the Bank that he considered the production inadequate. The Bank insisted that they had diligently searched all ten branches in the Bahamas and had produced all documents. On November 17, 1983, the

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the Eleventh Circuit sitting *en banc*. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

Bank turned over all of its records from the Cayman Islands. The IRS agent working on the case once more warned Bank's counsel that there were many more documents sought by the subpoena which the Bank had not produced.

Having chosen to ignore all warnings until the fine had started to accumulate, the Bank belatedly became concerned and ordered Mr. Nicol, in late November, 1983, to go to the Bahamas and insure that an effective search had been carried out. Nicol's search began in obvious places which had been previously ignored or overlooked. As a result of his efforts numerous additional documents were discovered at two of the Bank's Bahamian branches. Nine months after the original service of the subpoena, on December 5, 1983, the Bank produced photocopies of voluminous records from 1979. While examining the original documents from the December fifth turnover Mr. Nicol discovered that there were other documents which obviously still were missing. He requested another search of the box of records and obtained the missing documents. These documents were produced on January 25, 1984.

The flurry of activity undertaken by the Bank to discover documents after the trial court entered its order of contempt cannot save the Bank from the consequences of its previous extensive pattern of delay. *See, e.g.*, United States v. Work Wear Corp., 602 F.2d 110 (6th Cir. 1979). It is clear that the Bank had ample time to search its records and fully comply with the grand jury subpoena at least between April 27, 1983, when the trial court first ordered compliance, and November 14, 1983, when the fines began accumulating. The fact that the Bank at first may have believed erroneously that Bahamian law precluded disclosure, does not excuse the Bank's failure to perform a diligent search upon receipt of the trial court's order of enforcement. If the Bank had done so, it would have been able to avoid the fine with respect to the Bahamian documents by producing them all, rather than just a small fraction of them, on November 14, 1983.

B. Balancing Competing Interests

The Bank also asserts that compliance with the United States grand jury subpoena would require it to violate the Cayman Islands secrecy laws.[14] It therefore contends that it would be appropriate for the United States to moderate the exercise of its judicial enforcement powers in this case since the conflicting laws impose inconsistent obligations on the Bank. The district court, balancing the several factors enumerated in Section 40 of the Restatement (Second) of Foreign Relations Law of the United States (1965), properly concluded that enforcement of the subpoena was proper.

Section 40 provides:

> Limitations on Exercise of
> Enforcement Jurisdiction
>
> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as:
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of

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14 Most of the arguments raised by the Bank and *amici* challenge the contempt order against the Bank for failure to produce records from the Cayman Islands yet almost the entire fine imposed is attributable solely to the Bank's delayed production of records from the Bahamas. The Bank does not contest the validity of the underlying contempt order as it applies to the refusal to produce the documents from its Bahamian branches so we will discuss only the Cayman records.

> either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Restatement (Second) of Foreign Relations Law of the United States (1965).

The first Restatement factor is the relative interest of the states involved. In this case, the United States seeks to obtain information concerning the money transactions of individuals who are the target of a narcotics investigation. Stemming the narcotics trade has long been a concern of paramount importance to our nation. Congress has steadily enlarged the means available for the detection, prosecution and punishment of those who violate the narcotics laws of this country. Gore v. United States, 357 U.S. 386, 390, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958). Illegal narcotics trade generates enormous amounts of cash. Tracing the flow of these dollars is indispensable to this nation's efforts to stop the narcotics trade. Congress, as well as the Executive Branch, has long been "concerned about [the] serious and widespread use of foreign financial institutions, located in jurisdictions with strict laws of secrecy as to bank activity, for the purpose of violating or evading domestic criminal, tax and regulatory enactments." California Bankers Ass'n v. Shultz, 416 U.S. 21, 27, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974). *See also*, H.R. Rep. No. 91-975, 91 Cong. 2d Sess. 12 (1970), U.S. Code Cong. & Admin. News 1970, 4394, 4397.

The Cayman Islands, on the other hand, sees preservation of bank secrecy as vital to the expansion of the Island's principal industry-banking and off-shore finance. Yet the law does not operate as a blanket guarantee of privacy and has many exceptions.[15] As the Court of Appeal in Jamaica has stated:

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15 Disclosure may be made whenever authorized by the Grand Court, or "in the normal course of business," or with the "express or implied consent" of the "relevant principal," or "by or to" a constable investigating offenses in the jurisdiction, or "by or to" a constable investigating certain offenses alleged to have been committed abroad, or "by or to" the Financial Secretary, the Inspector or anyone else authorized by the Governor, or "by or to" a professional person where

> It would therefore appear that the policy of the legislature is that the Confidentiality Laws of the Cayman Islands should not be used as a blanket device to encourage or foster criminal activities . . . . [T]here is nothing in the statute to suggest that it is the public policy of the Cayman Islands to permit a person to launder the proceeds of crime in the Cayman Islands, secure from detection and punishment.

In re Confidential Relationships (Preservation) Law, United States v. Carver, (Jamaica Ct. App. 1982) (Joint Brief of the United Kingdom and the Cayman Islands, Appendix L). Furthermore, even if the Cayman Islands had an absolute right to privacy, this right could not fully apply to American citizens. The interest of American citizens in the privacy of their bank records is substantially reduced when balanced against the interests of their own government engaged in a criminal investigation since they are required to report those transactions to the United States pursuant to 31 U.S.C. § 1121 and 31 C.F.R. § 103.24 (1979).[16] United States v. Payner, 447 U.S. 727, 732 and n.4, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980).

We agree with the district court that the Bank suffered no hardship as a result of inconsistent enforcement actions. The Bank and the *amici* argue that it is unfair to require the Bank to be put in the position of having to choose between the conflicting commands of foreign sovereigns. Yet such occasions will arise and a bank indeed will have to choose. As we

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"necessary for the protection of himself or any other person against crime," or in accordance with the provisions of "any other law." Confidential Relationships (Preservation) Law § 3. The statute does not restrict the power of the Grand Court in ruling upon applications. In a criminal case for which an application for disclosure is made, the judge is merely instructed to "have regard to" the "interests of justice." *Id.* § 3A(6)(c).

16 The interest of the Cayman Islands in protecting the privacy of bank customers is also diminished here since the investigating body is a federal grand jury which is required by law to maintain the secrecy of its proceedings. *See*, United States v. Vetco, 644 F.2d 1324, 1331 (9th Cir. 1981); Fed. R. Crim. P. 6(e).

stated in In re Grand Jury Proceedings United States v. Field, 532 F.2d 404, 410 (5th Cir.), *cert. denied*, 429 U.S. 940, 97 S.Ct. 354, 50 L.Ed.2d 309 (1976):

> In a world where commercial transactions are international in scope, conflicts are inevitable. Courts and legislatures should take every reasonable precaution to avoid placing individuals in the situation [the Bank] finds [it]self. Yet, this court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interest of other states.

Consideration of the other factors set forth by the Restatement does not alter our conclusion that the district court properly enforced the subpoena and imposed contempt sanctions. The disclosure to the grand jury would take place in the United States. The foreign origin of the subpoenaed documents should not be a decisive factor.[17] The nationality of the Bank is Canadian, but its presence is pervasive in the United States.[18] The Bank has voluntarily elected to do business in

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17 The Government of Canada vigorously asserted that the situs of the records is of utmost significance and that, absent extraordinary circumstances, the law of the jurisdiction must prevail. This position is advanced only in a tentative draft of the revised Restatement and does not reflect the current law of the United States. *See, e.g.*, In re Grand Jury Proceedings, The Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982); United States v. Field, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976). The position advanced by the tentative draft has been explicitly rejected by the State Department. *See, e.g.*, Compelling Discovery and Evidence in International Litigation, Address of Honorable Davis R. Robinson, The Legal Advisor, U.S. Department of State before the Association of the Bar of the City of New York (February 14, 1984).

18 The Bank of Nova Scotia has branches in Boston and Portland, agencies in Atlanta, Miami, New York and San Francisco, representative offices in Chicago, Cleveland, Houston, and Los Angeles, and a wholly-owned subsidiary, Bank of Nova Scotia Trust Company of New York.

numerous foreign host countries and has accepted the incidental risk of occasional inconsistent governmental actions. It cannot expect to avail itself of the benefits of doing business here without accepting the concomitant obligations. As the Second Circuit noted years ago, "If the Bank cannot, as it were, serve two masters and comply with the lawful requirements both of the United States and Panama, perhaps it should surrender to one sovereign or the other the privileges received therefrom." First National City Bank of New York v. Internal Revenue Service, 271 F.2d 616, 620 (2d Cir. 1959), *cert. denied*, 361 U.S. 948, 808 S.Ct. 402, 4 L.Ed.2d 381 (1960).

Enforcement of the subpoena is consistent with the grand jury's goals of investigating criminal matters. It is also entirely consistent with the Cayman policy against the use of its business secrecy law "to encourage or foster criminal activities." In the Matter of Proceedings Pending in the United States District Court for the District of Columbia between United States of America and Ray R. Carver, et al., (Ct. of Appeal, Jamaica 1982) quoted in Joint Brief of the United Kingdom and the Cayman Islands at 26-27. We conclude that enforcement of the subpoena and the sanctions imposed in this case are proper under the balancing approach of Section 40.

III. *THE GENTLEMEN'S AGREEMENT*

Amici, United Kingdom and the Cayman Islands, contend that the subject subpoena should not be enforced because the United States is bound to follow the procedure developed as a result of a September 27, 1982, meeting and exchange of letters between the United States and Cayman Islands. The *amici* assert that this new procedure, called the gentlemen's agreement, was a precondition to enforcement of the grand jury subpoena. After considering the briefs and arguments of the parties and *amici*,[19] and reviewing the uncontroverted affidavits of the United States the district court found:

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19 Although the *amici* were very verbose in their briefs we were surprised that they presented no documents or evidence to the district

> [The letters exchanged between the United States and Cayman Islands] do not constitute any formal inter-governmental agreement. While the Cayman government may have manifested an intent to be bound to the agreed procedures, the United States government clearly did not. Additionally, the Cayman Governor was not under the impression that the United States intended to be bound by the procedures.

Supp. Record at 346.

Based upon this finding, the district court concluded:

> The letter agreements did not result in and in and of themselves do not constitute a contract by which the United States is bound. Even if the "gentlemen's agreement" was binding, it would not have required any course of action different from that which the government took in this case. By its terms, it did not require the government to resort first to the outlined procedures or to forfeit the prerogatives of the United States Attorney with respect to grand jury investigations. The "gentlemen's agreement" was not a means by which this Court could have properly required the government to reveal to the Bank or the Cayman government the materiality and necessity of the subpoenaed documents to the grand jury investigation. In other words, the government did not bargain away its rights under *McLean* [565 F.2d 318] and its progeny to maintain the secrecy of the investigation.

The district court's interpretation of the gentlemen's agreement procedure is the only rational interpretation supported by the record. The testimony and the letters reveal only preliminary negotiations with a hope of reaching a definite agreement in the future.[20] The March 15, 1983, letter from Governor

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court when dealing with the serious legal questions involved in this case.

20 Deputy Assistant Attorney General Roger Olsen's affidavit avers that it "would have been in direct contradiction to the authority

Lloyd to Consul General Michael Carpenter makes this clear. Governor Lloyd clearly indicated the decision of the Cayman Islands to implement the working procedures even though no confirmation had been received from the United States as to the procedures. It is clear from the evidence presented to the district court that this exchange of letters was not a binding, enforceable agreement but rather an experimental and tentative alternative for the production of documents.

Further, the gentlemen's agreement did not purport to limit the existing law enforcement investigatory methods used by the United States—such as the grand jury subpoena. On the contrary, each of the United States witnesses refuted this assertion. Government's Exhibits 2, 3 and 4. The January 11, 1983, letter from Deputy Assistant Attorney General Roger Olsen to Governor Lloyd, specifically rejected any such interpretation by stating:

> However, I do wish to reiterate that while we are willing to try out the proposed procedures, the United States retains the option of relying on other legal processes available to us in gathering evidence. Such processes include our seeking the issuance of orders from our own courts commanding the production of evidence from persons or institutions in our territory.

Government Exhibit 3A.

Finally, the mechanism set forth in the gentlemen's agreement is not even applicable where the United States is concurrently investigating tax and narcotics laws violations. Governor Lloyd informed Michael Carpenter that "it is only fair to say that I do foresee difficulty [in] the type of case which is clearly criminal but also has tax prosecution possibilities." Joint Brief of the United Kingdom and the Cayman Islands, Appendix Y-2). Since the grand jury investigation in this case concerned

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granted to me and our delegation" to enter into a binding agreement on September 27, 1982. Government Exhibit 3 at 5. *Amici* did not controvert this assertion.

both tax and narcotics violations it is clear that the gentlemen's agreement procedure was not applicable.[21]

The gentlemen's agreement procedure is a far cry from constituting a substantially equivalent alternative to a grand jury subpoena. The agreement represents nothing more than an understanding that informal requests for assistance would now be channeled between the Justice Department's Office of International Affairs and Cayman's Commissioner of Police. As Deputy Assistant Attorney General Olsen asserted, it would "violate good sense and reason" to forego the use of the subpoena power in these circumstances. Government Exhibit 3 at 5.

IV. *THE SINGLE CONVENTION ON NARCOTIC DRUGS*

Amici, United Kingdom and the Cayman Islands, also contend that the subject subpoena is void because it was issued contrary to the provisions of the Single Convention on Narcotic Drugs, 1961. The district court concluded that:

> The Single Convention on Narcotic Drugs, 1961. 18 U.S.T. 1409, TIAS 6298, New York, March 30, 1961, ratified by the United States 1967, does not control the conduct of the parties to this case. It cannot be interpreted to require that the government make a showing of materiality and necessity to a party or issue letters rogatory when seeking to obtain documents located in another party's jurisdiction. It does not restrict the grand jury subpoena power. It does not contain exclusive means for the exchange of information between parties. *Cf.*, *Vetco*, *supra*, 691 F.2d at 1285-1286.

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21 It is also important to note that the informal procedure has not resulted in the expeditious production of bank records. John Harris stated that as of February 14, 1984, "no bank records have ever been received in any case by the United States in the fourteen months that the informal agreement has been under experiment, even though access to such evidence was one of the central aims of our discussions." Government Exhibit 4 at 7-8.

Supplemental Record at 350-351.
We agree.

The primary purpose of the Convention was to simplify and rationalize the numerous existing treaties on the international control of production and commerce in narcotic substances. Its ultimate goal was to eliminate illicit drug trafficking. *See generally*, Cohrrsen and Hoover, The International Control of Dangerous Drugs, 9 J. Int. L. and Econ. 81, 83-85 (1974); Lande, The Single Convention on Narcotic Drugs, 1961, 16 Int'l Org. 776 (1962).

To effectuate this goal, Article 35, entitled "Action against the illicit traffic", provides for cooperation by the signatory countries, "having due regard to their constitutional, legal and administrative systems." Under Article 36, the parties agree to provide criminal penalties for any drug transactions which are contrary to the provisions of the convention. The obligation of each party to provide these penalties is subject to the constitutional limitations and the legal system and domestic law of each signatory country. Thus, it is clear that the drafters of the Convention wanted to ensure that it was sufficiently flexible so as to be generally acceptable.

In *In re Baird*, 668 F.2d 432 (8th Cir.), *cert denied*, 456 U.S. 982, 102 S.Ct. 2255, 72 L.Ed.2d 860 (1982), the court recognized that the Single Convention did not impair the investigatory powers granted to the grand jury under United States law. Similarly, in In Re Nigro, 555 F. Supp. 65 (D. Colo.), *aff'd*, 705 F.2d 1224 (10th Cir. 1982), *cert. denied sub nom*, ____ U.S. ____, 103 S.Ct. 2087, 77 L.Ed.2d 298 (1983), the court protected the integrity of the grand jury process by emphasizing that the Single Convention would not require the abrogation of the grand jury secrecy rule, and held that an immunized witness could be compelled to testify despite an alleged fear of foreign prosecution. These cases clearly establish that a country's obligations to cooperate under the Single Convention are governed by its own domestic law. The only logical interpretation of the Single Convention vis-a-vis existing law enforcement techniques is that the Single Convention was intended to

encourage the expansion of available mechanisms for obtaining relevant information. It cannot be interpreted in a way that hinders, rather than aids, the enforcement of drug trafficking laws. United States v. Liles, 670 F.2d 989 (11th Cir.), *cert. denied*, ____ U.S. ____, 102 S.Ct. 2300 (1982); United States v. Richardson, 580 F.2d 946 (9th Cir. 1978), *cert. denied*, 439 U.S. 1068, 99 S.Ct. 835, 59 L.Ed.2d 33 (1979).

The existence of the Single Convention on Narcotic Drugs does not require any greater deference to foreign law than that already recognized in the balancing test set forth in the Restatement. The requirement of international cooperation in Article 35 permits the United States to cooperate with "due regard" to its own legal system. The well-established legal system of the United States permits enforcement of grand jury subpoenas under the circumstances of this case. The Single Convention neither requires the United States to forego this method of obtaining records nor does it require the Cayman Islands to defer to it. The existence of the Single Convention does not restrict the grand jury's power in this case.

V. *THE ACT OF STATE DOCTRINE*

Only the United Kingdom asserts that the act of state doctrine should be applied here to thwart the efforts by the Executive Branch to obtain records in furtherance of a grand jury investigation into conduct crossing our nation's boundaries. The doctrine is completely inapplicable to this case. The act of state doctrine is primarily designed to avoid impingement by the judiciary upon the conduct of foreign policy by the Executive Branch. It is aimed at preventing judicial interference with the conduct of foreign relations by questioning the validity of the acts of foreign sovereigns in the context of a civil suit.[22] The doctrine is not required by considerations of sovereignty, international law or the Constitution. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-27, 84 S.Ct.

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22 As Commentary j to Restatement § 41 notes, the act of state doctrine is a variant of "conflict of law rules" for "settlement of civil litigation of a private nature."

923, 11 L.Ed.2d 804 (1964); Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 605 (9th Cir. 1976). Instead the doctrine "derives from the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of the government." Timberlane Lumber Co. v. Bank of America, 549 F.2d at 605.

The Restatement's definition of the rule renders it completely inapplicable in the investigatory or criminal context:

> Except as otherwise provided . . . a court in the United States, having jurisdiction . . . to determine a claim asserted against a person in the United States or with respect to a thing located there, or other interest localized there, will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests.

Restatement (Second) Foreign Relations Law of the United States § 41 (1965).

It is also inapplicable in this case because the Cayman Grand Court purported to control conduct in the United States by blocking compliance with the grand jury subpoena, whereas the classic formulation of the doctrine is set forth in Underhill v. Hernandez, 168 U.S. 250, 252, 18 S.Ct. 83, 42 L.Ed. 456 (1897) as follows:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

The district court correctly concluded that the doctrine had no application to this case.[23] The district court pointed out that

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23 The court also pointed out that even if we were to assume that the act of state doctrine applied, this case would fall within the *Sabbatino* exception. The court stated:

> [T]here was no danger in this case that enforcement of the subpoena would inpinge upon fundamental matters committed by the Constitution to other branches of government. The branch of

it never "passed upon the validity of any act of a foreign state before issuing the April 27 order denying the Bank's motion to quash the subpoena and directing the Bank to comply with the subpoena." Supp. R. at 351. The court also never conducted an inquiry into the validity of a public act of a foreign sovereign. United States law does not require blindly giving effect to the act of a foreign sovereign without "having due regard . . . to the rights of its own citizens, or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895).

We have previously recognized that international friction is provoked by enforcement of subpoenas such as the one in this case. In re Grand Jury Proceedings United States v. Bank of Nova Scotia, 691 F.2d at 1388. But under our tripartite form of government federal courts remain open to the legislative and executive branches for assistance if matters such as this prove to have international repercussions. *See, e.g.*, United States v. First National City Bank, 379 U.S. 378, 384-85, 85 S.Ct. 528, 531-32, 13 L.Ed.2d 365 (1965). The grand jury is a centuries-old, common law institution which is vital to our system of government. It has both the right and the duty to inquire into the existence of possible criminal conduct. Branzburg v. Hayes, 408 U.S. 665, 688, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626 (1972). Indispensable to the exercise of its power is the authority to require the production of evidence. United States v. Mandujino, 425 U.S. 564, 571, 96 S.Ct. 1768, 1774, 48 L.Ed.2d 212 (1976). The district judge in this case was extremely patient. He gave the Bank ample chances to comply with the subpoena. But the Bank was just sloppy in its search. The remedy for violation of the district court's order is civil contempt. The imposition of a coercive fine is not improper, In

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government to which these matters of foreign policy are committed is the same branch seeking (and obtaining) enforcement of the subpoena. The court in *Sabbatino* observed that '. . . when the executive branch of our Government announces that it does not oppose inquiry by American courts into the legality of foreign acts, an exception to the judicial abnegation required by the act of state doctrine has arisen. . . .' *Id.* at 857-858.

re Grand Jury Impaneled January 21, 1975, 529 F.2d 543, 550-51 (3d Cir.), *cert. denied sub nom*, Freedman v. United States, 425 U.S. 992, 96 S.Ct. 2203, 48 L.Ed.2d 816 (1976), and will be reversed only for an abuse of discretion. *See*, *e.g.*, United States v. Flores, 628 F.2d 521, 527 (9th Cir. 1980). The order of contempt and the fine in this case did not constitute an abuse of the district court's discretion.

AFFIRMED.

APPENDIX B

Order of the
United States District Court
for the Southern District of Florida

IN RE GRAND JURY PROCEEDINGS

UNITED STATES

v.

BANK OF NOVA SCOTIA

Case No. 83-1(WPB) GJ

United States District Court,
S.D. Florida.

February 28, 1984

This cause came before the Court on the order of remand from the United States Court of Appeals for the Eleventh Circuit, issued December 28, 1983, *In re Grand Jury Proceedings, United States v. The Bank of Nova Scotia*, 722 F.2d 657 (11th Cir. 1983) (hereinafter referred to as "Bank of Nova Scotia II"), and on the United States' motion for judgment and assessment of fine, filed on or about January 25, 1984.

Following a review of the order of remand, this Court issued an order on January 6, 1984 inviting the litigants and interested parties to file submissions addressing the issues raised in the appellate court opinion. Leave to appear as *amicus curiae* was granted to the Government of Canada, the Canadian Bankers' Association and the United Kingdom of Great Britain and Northern Ireland and the Cayman Islands. The litigants and

amici made submissions and appeared at a hearing conducted on February 14, 1984.

Generally, the Eleventh Circuit remanded this cause for this Court to accomplish two objectives: one objective is to provide the Eleventh Circuit with a complete factual record, especially concerning the events that occurred during the pendency of the appeal, but also including any information that this Court *should* have had before issuing the contempt order. The other is to hear the views of the amici. Accomplishing these objectives entails a complete reconsideration of the actions taken by this Court in this case, in view of the newly submitted information. In an attempt to aid appellate review, set forth below are the findings of fact and conclusions of law reached by this Court in this case, in accordance with Fed.R.Civ.P. 52(a). *See*, 5A *Moore's Federal Practice*, § 52.06[1] at 2706 (2d ed. 1980).

A. Findings of Fact

1. The Bank of Nova Scotia (hereinafter referred to as the "Bank") is a Canadian banking corporation, headquartered in Toronto, with an agency in Miami and branches in the Bahamas and the Cayman Islands.

2. The executive branch of the United States is represented in this litigation by the United States Attorney for the Southern District of Florida.

3. On March 1, 1983, federal Grand Jury 83-1, sitting in West Palm Beach, Florida, issued a subpoena *duces tecum* to the Bank requesting documents maintained by the Bank at its branch offices in the Bahamas, the Cayman Islands and the Lesser Antilles.[1] The subpoena was served on the Bank's Miami agency on March 4, 1983 and was initially returnable on March 29, 1983.

4. On March 22, 1983, the Miami agency sent telexes informing the Bahamian and Cayman branches of the subpoena.

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1 The litigants have stipulated that no bank records named in the subject subpoena exist in the Bank's branch in Antigua, Lesser Antilles. There is no concern, then, with this branch.

On March 23, 1983, counsel for the Bank, William E. Sadowski, Esq. (hereinafter referred to as "Sadowski") wrote a letter to the Assistant United States Attorney handling this matter, Thomas A. Blair, Esq. (hereinafter referred to as "Blair"), requesting *inter alia* ". . . a sworn statement regarding the nature of the evidence sought by the subpoena and its relation to the investigation."

5. An agent for the Bank appeared before the Grand Jury on March 29, 1983 and declined to produce the subpoenaed documents.

6. On April 4, 1983, the Bank moved to quash the subpoena, or alternatively, for an order:

> 1. Granting The Bank additional time to respond to the subpoena and, in particular, to pursue available avenues for obtaining the permission of foreign governments (of the Bahamas and Cayman Islands) to disclose customer information.
>
> 2. Containing explicit and detailed findings relative to the materiality and necessity of the subpoenaed documents to The Grand Jury's investigation for the use by The Bank to support an application to the Grand Court of the Cayman Islands for permission to disclose subpoenaed documents which may be located in The Bank's Cayman Islands Branch.
>
> 3. Directing the United States Government to provide assistance to The Bank in foreign jurisdictions.
>
> 4. Directing the United States Government to provide The Bank with an affidavit or other comparable document setting forth the materiality and necessity of the subpoenaed documents to the Grand Jury's investigation for use by The Bank in support of its application to the Grand Court of the Cayman Islands for permission to disclose subpoenaed documents which may be located in The Bank's Cayman Islands branch.
>
> 5. Directing the United States to issue letters rogatory to the Commonwealth of the Bahamas requesting that the

Bahamas permit The Bank to disclose the subpoenaed documents.

7. On April 27, 1983, this Court issued an order denying the Bank's motion to quash and 1) granting the Bank additional time to respond to the subpoena, 2) declining the request to require the government to set forth the materiality and necessity of the subpoenaed documents to the Grand Jury investigation (and by implication, the request to this Court to make "explicit and detailed findings relative to the materiality and necessity of the subpoenaed documents"), 3) declining the request to require the government to forward letters rogatory but 4) requiring the government to provide "any reasonable assistance" to the Bank. Furthermore, that order clearly required the Bank to comply with the subpoena.

8. In a letter dated May 2, 1983 from Sadowski to Blair, the Bank requested 1) "an affidavit or other evidence which would establish the materiality of the documents being sought to the investigation being conducted by the Grand Jury" to assist the Bank's application for a judicial waiver under the Cayman bank secrecy law and 2) the issuance of letters rogatory in order to obtain the documents located at the Bahamian branch. Blair responded in a letter to Sadowski dated May 5, 1983 that "the present investigation involves apparent violations of both the tax and narcotics law of the United States" and that "we are specifically declining to send letters rogatory to the Bahamian and Cayman governments."

9. Other correspondence between Sadowski and Blair during May, 1983 was essentially similar: The Bank requested the government to provide a showing of the materiality and necessity of the subpoenaed documents to the Grand Jury investigation and the government refused.

10. On May 27, 1983, the Bank made its first application in the Grand Court of the Cayman Islands for permission to disclose the subpoenaed documents. That application contained a copy of this Court's April 27th order. Thus, the Grand

Court was aware that 1) this Court ordered the Bank to comply with the subpoena and that this Court declined the Bank's request to order the government to show materiality and necessity or to issue letters rogatory. In the face of an order of this Court directing production of the subpoenaed documents, the Grand Court issued an order on May 31, 1983 prohibiting such production. There is no evidence that the Bank appealed the Grand Court's May 31st order to the Court of Appeals of Jamaica.[2]

11. This Court conducted a hearing on June 1, 1983. At that time, the Bank had yet to comply with the subpoena. Again, the Bank requested an order directing the government to provide a showing of materiality and necessity. And again, the Bank sought an order containing findings relative to the materiality and necessity of the subpoenaed documents to the Grand Jury investigation. The Bank's counsel expressed uncertainty as to whether the requested showing and findings would be sufficient for the Cayman Court.

> THE COURT: You think the courts down there might respond to a finding on the part of this Court there is materiality, and relevancy, or you think they are going to have to have the bare evidence themselves on which to make that determination?
>
> MR. SADOWSKI: Your honor, I don't know; and frankly, we have sessions where a bunch of us will sit down and try to come up with areas that we can get. We understand we have a reticent government, and we can understand the hesitancy to get involved with these things. It is hard enough to deal with the Federal court system. If we get an affidavit from the government which is less detailed,

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2 "As a matter of convenience appeals from the Georgetown [Cayman] Grand Court still lie to the judiciary in Jamaica . . . ." N. Williams, *A History of the Cayman Islands* at 86 (1970) *quoted in* Joint Brief of the United Kingdom of Great Britain and Northern Ireland and the Cayman Islands as Amici Curiae, served on January 25, 1984, at 24 (hereinafter referred to as "Joint Brief").

> provides less detail than the five statewide grand jury affidavit, but if we were able to couple that with an order from your Honor finding, indeed sort of under the Schofield cases, finding there is—the documents requested are material and necessary to the grand jury's investigation, and as much in addition to that as your Honor could by way of specific facts found and everything, it would give us something to argue from, and I would think it would have to be—have some persuasive effect on the Grand Court. It has not been done, to my knowledge.

The government's position was clear: it was willing to provide any requested assistance—short of showing materiality and necessity and sending letters rogatory.

> MR. BLAIR: The Government is declining to lay open its entire grand jury investigation for the purpose of proceeding in the foreign court. I do not believe that is what the Court intended in its order of April 27th. If there is anything specific we could do, we would be happy to do that, and I asked Mr. Sadowski to tell me what that might be, and he told me he needed letters rogatory in the Bahamas, and for the Caymans, extensive, inclusive affidavit showing materiality; and the Government's position is, if this Court doesn't feel that it can require the Government to make that showing here, I don't interpret your order of April 27th to compel us to make it in some foreign court. Perhaps I am reading your order wrong. I would be happy to be further instructed.

12. There is no evidence of any efforts taken by the Bank in the Bahamas or the Caymans during the time between the June 1st hearing and the October 20th contempt hearing.

13. On October 10, 1983, this Court again ordered the Bank to comply with the subpoena. In that order, this Court concluded that "the government has done all that it is required to do by law and by this Court's order of April 27, 1983 in connection with the enforcement of its subpoena."

14. The contempt hearing was held on October 20, 1983. At this hearing, the Bank offered into evidence the telexes mentioned in finding No. 4, *supra*, the exchange of correspondence between Sadowski and Blair mentioned in findings Nos. 4, 8 and 9, *supra*, a copy of the Cayman business secrecy law and the opinions of Cayman counsel regarding the application of that law. The Bank argued that its efforts of attempting to persuade the government to make a showing of materiality and necessity or to issue letters rogatory constituted good faith compliance with the subpoena. This Court concluded that "There is clear and convincing evidence that the Bank had not turned over the subpoenaed materials and thus, this Court finds the Bank in contempt of the order of October 10, 1983." A fine of $25,000 per day, effective October 26, 1983, was imposed to coerce the Bank to comply with the subpoena. That fine was stayed by the Eleventh Circuit from October 25 to November 14, 1983.

15. In response to a request by the Bank, this Court entered a supplemental finding on October 24, 1983. That finding was that the Bank had failed to persuade the Court that it had made a good faith effort to comply with the subpoena. As grounds for this finding, the order stated:

> The focus of the Bank's efforts has been to obtain from the government what it is clearly not entitled to receive: first, a showing of the materiality and necessity of the subpoenaed documents to the grand jury investigation and secondly, the forwarding of letters rogatory. (*See* this Court's order of April 27, 1983 and the citations therein.) This Court has given the Bank more than adequate time to exhaust remedies available under Bahamian law and to seek other measures under Caymanian law; the exhibits offered into evidence at the October 20th hearing indicated no such efforts past early June, 1983.

16. At the hearing conducted on February 14, 1984, the Bank offered no new evidence of any efforts aimed at complying with the subpoena before October 20th.

17. On November 11, 1983, the Attorney General of the Bahamas concluded that, where the Bahamian branch did not have an account relationship with the subject of the subpoena, the dealings of the parties in the Bahamas did not constitute a customer relationship, so that the documents found in the Bahamas were not protected by the Bahamian bank privacy statute. There is no indication in the record as to if and when the Bank first sought this interpretation by the Attorney General, why this interpretation was not sought earlier or why this conclusion could not have been reached by the Bank itself after a review of the subpoena, the Bank's account records and the relevant portions of the Bahamian law.

18. Bank officials conducted four searches for documents located in the Bahamas on March 11, 1983, April 14, 1983, November 14, 1983 and November 24, 1983. Documents found during these searches were produced to the Grand Jury on November 14, 1983, December 5, 1983 and January 25, 1984. The documents produced on January 25th are significantly different from any documents produced earlier. They are not merely copies of earlier produced documents.

19. On November 11, 1983, the Grand Court of the Caymans reconsidered the issue of disclosure but again refused to permit the Bank to disclose the records.

20. On November 17, 1983, the Governor of the Cayman Islands authorized the disclosure of the subpoenaed documents. This action was taken pursuant to Section 3(2)(b)(iv) of Cayman's Confidential Relationships (Preservation) Law, which provides in part:

> (2) This Law has no application to the seeking, divulging, or obtaining of confidential information—. . .
>
> (b) by or to—. . .
>
> (iv) . . . , in relation to particular information specified by the Governor, such other person as the Governor may authorize.

Although this type of authorization was without precedent in Cayman law, the Bank considered making a request to the Governor under this provision but never did so. During direct examination at the February 14th hearing, Cayman counsel retained by the Bank with respect to this subpoena testified in response to the following questions:

> (by Mr. Newcomb)
>
> Q. The Bank ultimately received an order from the Governor and with the concurrence, apparently, of the Executive Council permitting disclosure of these documents. In your experience, has there ever been such an order previously issued?
>
> A. No, it was unprecedented.
>
> Q. And in your discussions with the Bank prior to that time when you rendered your opinion in October, did you anticipate that was an available road? Was there any opportunity for the Bank to apply for that kind of relief, shall I say?
>
> A. The question was raised but it is very difficult to tell exactly what section 32(b)(iv) was directed to. That is the subsection under which the authority was given and as it had never been used in this sort of instance before, *it was left as one of the options that the Bank could pursue with the Government of the Cayman Islands directly at that time*. (Emphasis supplied.)

No explanation has been offered for the Bank's failure to pursue this option.

21. On November 18, 1983, the Grand Court of the Cayman Islands issued an order permitting disclosure, pursuant to the action taken by the Governor.

22. All of the documents located at the Cayman branch were produced to the Grand Jury on November 17, 1983.

23. Evidence of the "letter agreements" referred to in the appellate court opinion, *Bank of Nova Scotia II*, *supra*, 772 F.2d at 658, and frequently referred to by the parties at the

February 14th hearing as the "Gentlemen's Agreement", was received into evidence at the February 14th hearing. It consisted of the following:

a. Government's Exhibit 4-A.

On September 13, 1982, Michael Carpenter, Consul General of the United States, wrote a letter to its Excellency, G.P. Lloyd, C.M.G., Governor of the Cayman Islands. In that letter, a meeting between appropriate representatives of the United States and the Cayman Islands was scheduled. As to the purpose of the meeting, the letter said:

> The purpose of the discussions will be to establish workable procedures for channelling and considering United States' requests for information presently protected by Caymanian confidentiality laws. *There is no plan* to discuss amendments to those laws or *to enter upon negotiation of any formal inter-governmental agreement*. (Emphasis supplied.)

b. Government's Exhibit 2-A.

After the meeting, Acting Governor of the Caymans, D.H. Foster, wrote a letter dated October 5, 1983 to Michael Carpenter. The purpose of this letter was "formally to confirm the agreement of the Government of the Cayman Islands to the working procedures. . ." The letter then set forth six procedures, followed by this language: "I should be obliged for confirmation that this is your Government's understanding. . . ."

c. Government's Exhibit 2-B.

In response to Mr. Foster's letter, Deputy Assistant Attorney General, Roger M. Olsen, wrote a letter dated January 11, 1983 to Governor Lloyd. That letter said in part:

> The representatives of the United States Department of State and Department of Justice who attended that meeting have reviewed the letter, and we are happy to agree that the working procedures set out in Mr. Foster's letter are in accord with our understanding. *However, I do wish*

> *to reiterate that while we are willing to try out the proposed procedures, the United States retains the option of relying on other legal processes available to us in gathering evidence. Such processes include our seeking the issuance of orders from our own courts commanding the production of evidence from persons or institutions in our territory.*
>
> We share Mr. Foster's hope that the understanding will be of value in enabling our Governments to coordinate more closely in the battle against crime. However, we do have several reservations about whether the proposed procedures satisfactorily address both our Governments' needs. (Emphasis supplied.)

Mr. Olsen went on to express three concerns. He concluded by saying:

> For these reasons, I believe that it is very important that we sit down and discuss means of resolving these remaining outstanding issues. I suggest that these talks [take] place in Georgetown no later than the end of January, 1983.

d. Government's Exhibit 2-C.

In response to Mr. Olsen's letter, Governor Lloyd wrote a letter dated March 15, 1983 to Mr. Carpenter. Before replying to the concerns expressed by Mr. Olsen, the Governor stated:

> I am pleased to know that your Government shares the feeling of the Cayman Islands Government that the talks which were held in Miami late last year were very useful, and that both Governments are in accord on the working procedures agreed. As you are probably aware, we decided in the Cayman Islands, shortly after that meeting, that *even though no confirmation had been received from your Government as to the agreed procedures*, they would be implemented by us. We have already processed a number of requests through these channels and have forwarded the information released to the Senior Trial Attorney, U.S. Department of Justice. (Emphasis supplied.)

24. Government's Exhibits 4-A, 2-A, 2-B and 2-C do not constitute any formal inter-governmental agreement. While the Cayman government may have manifested an intent to be bound to the agreed procedures, the United States government clearly did not. Additionally, the Cayman Governor was not under the impression that the United States intended to be bound by the procedures.

B. Conclusions of Law

1. At the core of this litigation is the clearly stated rule in this circuit that the government is not required to show that documents sought by way of a grand jury subpoena are relevant to an investigation properly within the grand jury's investigation. *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982) (hereinafter referred to as "Bank of Nova Scotia I"). The Eleventh Circuit has repeatedly declined requests to overturn this rule. *In re Grand Jury Proceedings, United States v. Nigel Bowe*, 694 F.2d 1256, 1258 (11th Cir. 1982); *In re Slaughter*, 694 F.2d 1258, 1260 (11th Cir. 1982). The rationale for the rule was stated in *In re Grand Jury Investigation, United States v. McLean*, 565 F.2d 318 (5th Cir. 1977):

> Any holding that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. *United States v. Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 773 (1973).

Id. at 320.

Coupled with the recognition that the role of a district court with respect to grand jury proceedings is limited, *United States v. Pabian*, 704 F.2d 1533, 1536-37 (11th Cir. 1983); *United States v. Eisenberg*, 711 F.2d 959, 964-965 (11th Cir. 1983), adherence to *McLean* and its progeny formed the premise upon which the court orders in this litigation were entered.

2. The issuance of letters rogatory is not the substantial equivalent to a grand jury subpoena. *See*, *Bank of Nova Scotia I*, *supra*, 691 F.2d at 1390-91; *United States v. Vetco, Inc.*, 644 F.2d 1324 (9th Cir. 1981).

3. This Court again concludes that the Bank failed to exercise good faith in its efforts to comply with the subpoena.

First, the reality of what the Bank sought to do in this case was to obtain what it was clearly not entitled to receive: first, a showing of the materiality and necessity of the subpoenaed documents to the grand jury investigation and second, the issuance of letters rogatory. While the Bank's efforts were extensive, they were unreasonably taken in view of *McLean* and its progeny and this Court's order of April 27, 1983. Moreover, the argument made by the Bank before this Court is substantially the same as the argument that was explicitly rejected by the Eleventh Circuit in *Bank of Nova Scotia I*, *supra*, 691 F.2d at 1387.

4. As pointed out by the appellate in *Bank of Nova Scotia II*, 722 F.2d at 658, "The enforcement of such subpoenas requires the balancing of many factors including the national interests of the countries involved." Restatement (Second) of Foreign Relations Law of the United States § 40 (1965) adopted in *In re Grand Jury Proceedings, United States v. Field*, 532 F.2d 404 (5th Cir. 1976), *cert. denied*, 429 U.S. 940, 97 S.Ct. 354, 50 L. Ed.2d 309 (1976). Section 40 reads:

> Limitations on Exercise of Enforcement Jurisdiction
>
> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as:
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

As to the first factor, the interest of the United States in furthering the investigatory function of the grand jury has been described as "vital". *Field*, *supra*, 532 F.2d at 407. The Cayman Islands, in its *amici* brief on remand, has provided great assistance to this Court in describing the interests of the Caymans in its business secrecy law, The Confidential Relationships (Preservation) Law.

> . . .[t]he Act embodies or evidences several complementary policies: (i) the individual's right to privacy under Cayman law, (ii) the facilitation and implementation of economic policies designed to sustain and expand the Islands' principal industry, i.e., banking and off-shore finance, (iii) a healthy demonstration of the right to self-determination and principles of self-government, and (iv) sovereign assertion of jurisdiction over its territory under principles of English common law.
>
> Moreover, the fundamental privacy interests protected by the Act reflect a deliberate domestic policy, whose intellectual and legal origins are as old as English law and the Cayman's retention of the British common law of bank confidentiality is firmly rooted in the Cayman and English constitutional order and the colonial tradition.

Joint Brief at 26.

This Court concludes that the interests of the Caymans may also be characterized as "vital".

As to the second factor, the Bank suffered no hardship in Cayman or Bahamian courts as a result of inconsistent enforcement actions.

As to the third and fourth factors, disclosure of the subpoenaed records took place in the United States. The national-

ity of the Bank is Canadian, although its presence is pervasive in the United States.

As to the last factor, enforcement of the subpoena is consistent with the grand jury's goals of investigating criminal matters. So too, it is entirely consistent with the Cayman policy against the use of its business secrecy law "to encourage or foster criminal activities." *In the Matter of Proceedings Pending in the United States District Court for the District of Columbia between the United States of America and Ray R. Carver, et al.*, (Ct. of Appeal, Jamaica 1983), quoted in Joint Brief at 26-27.

This Court concludes that enforcement of the subpoena is proper under Section 40.

5. The letter agreements did not result in and in and of themselves do not constitute a contract by which the United States is bound. Even if the "gentlemen's agreement" was binding, it would not have required any course of action different from that which the government took in this case. By its terms, it did not require the government to resort first to the outlined procedures or to forfeit the prerogatives of the United States Attorney with respect to grand jury investigations. The "gentlemen's agreement" was not a means by which this Court could have properly required the government to reveal to the Bank or the Cayman government the materiality and necessity of the subpoenaed documents to the grand jury investigation. In other words, the government did not bargain away its rights under *McLean* and its progeny to maintain the secrecy of the investigation.

6. The Single Convention on Narcotic Drugs, 1961. 18 U.S.T. 1407, TIAS 6298, New York, March 30, 1961, ratified by the United States 1967, does not control the conduct of the parties to this case. It cannot be interpreted to require that the government make a showing of materiality and necessity to a party or issue letters rogatory when seeking to obtain documents located in another party's jurisdiction. It does not restrict the grand jury subpoena power. It does not contain

exclusive means for the exchange of information between parties. *Cf.*, *Vetco*, *supra*, 691 F.2d at 1285-1286.

7. The Act of State doctrine, *see*, *Banco National De Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962), has no application to this litigation. This Court never passed upon the validity of any act of a foreign state before issuing the April 27th order denying the Bank's motion to quash the subpoena and directing the Bank to comply with the subpoena. For that matter, this Court never conducted an inquiry into the validity of a public act of a foreign sovereign.

Even assuming that the act of state doctrine applied, there was no danger in this case that enforcement of the subpoena would impinge upon fundamental matters committed by the Constitution to other branches of government. The branch of government to which these matters of foreign policy are committed is the same branch seeking (and obtaining) enforcement of the subpoena. The Court in *Sabbatino* observed that ". . .when the executive branch of our Government announces that it does not oppose inquiry by American courts into the legality of foreign acts, an exception to the judicial abnegation required by the act of state doctrine has arisen . . . ." *Id.* at 857-858. If the doctrine applied to this litigation, so would this exception.

8. Beginning at 12:01 P.M., November 14, 1983 and continuing to January 25, 1984 at 12:00 noon, the Bank was in contempt of this Court's order of October 20, 1983. The Bank to date has accrued a daily fine of $25,000.00 per day for a period of 73 days, for a total of $1,825,000, which is now due and owing to the United States of America.

In accordance with the foregoing, it is

ORDERED and ADJUDGED that:

1. Enforcement of the subpoena in this case is proper; and,

2. The Clerk is directed to enter judgment in favor of the United States and against the Bank of Nova Scotia, in the

amount of $1,825,000; execution of said judgment shall be suspended pending the appellate resolution of this litigation.

DONE and ORDERED at West Palm Beach, Florida this 28th day of February, 1984.

James C. Paine /s/
United States District Judge

APPENDIX C

Opinion of the
United States Court of Appeals
for the Eleventh Circuit

722 F.2d 657

IN RE GRAND JURY PROCEEDINGS
THE BANK OF NOVA SCOTIA

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

THE BANK OF NOVA SCOTIA

Defendant-Appellant.

No. 83-5708

United States Court of Appeals,
Eleventh Circuit.

December 28, 1983

Appeals from the United States District Court for the Southern District of Florida

Before FAY and ANDERSON, Circuit Judges, and BOYLE, District Judge*

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* Honorable Edward J. Boyle, Sr., U.S. District Judge for the Eastern District of Louisiana, sitting by designation.

PER CURIAM:

This appeal involves a grand jury subpoena issued by the United States District Court for the Southern District of Florida and served upon the Bank of Nova Scotia at its Miami, Florida agency on March 4, 1983. The subpoena required the production of bank records located in the Bank's branches in Nassau, Bahamas, Georgetown, Grand Cayman Islands, and Antigua, Lesser Antilles. The bank was ordered to comply with the subpoena and found in contempt for failure to do so. Thus this appeal.

While this matter has been pending in our court it appears much has transpired. We are advised by counsel that all of the records have been produced. This is disputed by the government. We have been advised that the appropriate governmental officials of the Cayman Islands have removed any restrictions or obstacles otherwise presented by the banking laws of those islands. We have been told that the Grand Court of the Cayman Islands has vacated its earlier restrictive orders issued in this matter.

As a result of briefing and oral argument, it has come to our attention that there exists a Single Convention on Narcotics Drugs signed by both the United States and the Cayman Islands and letter agreements between officials of the same governments that may control the conduct of the parties involved but that such were not brought to the attention of the trial court. The bank suggests that it was unaware of these documents while the U.S. Attorney suggests his conduct was in compliance with a request by the government of the Cayman Islands.

The bank presents an argument suggesting it has purged itself of any contempt but concedes that issue has never been directed to the trial judge. This court has raised the question of mootness with conflicting responses by the parties and amicus.

During the short pendency of this appeal, the court has received briefs from various amici including the Cayman Islands, Canada, the United Kingdom of Great Britain and Northern Ireland and the Canadian Bankers' Association.

None of these entities presented their views to the district court.

As pointed out by our ccurt *In re Grand Jury Proceedings, United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982) at page 1389, the enforcement of such subpoenas requires the balancing of many factors including the national interests of the countries involved. Restatement (Second) of Foreign Relations Law of the United States § 40 (1965) adopted in *In re Grand Jury Proceedings, United States v. Field*, 532 F.2d 404 (5th Cir. 1976), *cert. denied*, 429 U.S. 940, 97 S.Ct. 354, 50 L.Ed.2d 309 (1976). The district court attempted to do this but we are concerned that much relevant information was either not available or deliberately withheld or both.

In sum, under the peculiar situation that exists, we are remanding this matter for further proceedings. Should amici before us desire to intervene, appropriate petitions should be filed immediately in the district court. Should the bank desire to present additional evidence concerning its efforts to comply with the subpoena, a hearing should be scheduled. All interested entities are urged to render full assistance to the district court. We request that such action be taken within sixty days and that the district court advise us of its findings and conclusions within seventy days of this order.

We retain jurisdiction of this matter and will dispose of the issues presented after the district court holds such proceedings as are necessary and consistent with this order.

APPENDIX D

Supplemental Finding of the United States District Court for the Southern District of Florida

IN RE GRAND JURY PROCEEDINGS

UNITED STATES

v.

BANK OF NOVA SCOTIA

Case No. 83-1(WPB) GJ

United States District Court,
S.D. Florida.

October 24, 1983

SUPPLEMENTAL FINDING

This cause came before the Court for a civil contempt hearing on October 20, 1983. On that date, this Court issued an order holding the Bank of Nova Scotia ("the Bank") in civil contempt and levying a fine of $25,000.00 per day until the subpoena was complied with, effective October 26, 1983. The next day, the undersigned received a letter from Mr. William E. Sadowski, Esq., counsel for the Bank, requesting "findings on the good faith issue". Since such a finding may be helpful to the reviewing court and to the parties, this Court will treat Mr. Sadowski's letter as a motion to supplement this Court's order of October 20, 1983.

The Bank seeks a finding on the good faith issue in an attempt to distinguish this case from *In re: Grand Jury Proceedings, United States v. The Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 103 S.Ct. 3086 (1983). Particularly, it is the Bank's p[osition that if this Court finds that the Bank exercised good faith in its efforts to obtain the subpoenaed materials—short of violating foreign law—then it comes within the holding of *Societe Internationale Power Participations' Industriells v. Rogers*, 78 S.Ct. 1087 (1958) and should be excused from the requirements of the subpoena.

Without deciding whether or not a finding of good faith would so support the Bank's argument, this Court is not persuaded that the Bank has exercised good faith in its efforts to comply with the subpoena. The focus of the Bank's efforts has been to obtain from the government what it is clearly not entitled to receive: first, a showing of the materiality and necessity of the subpoenaed documents to the grand jury investigation and secondly, the forwarding of letters rogatory. (*See* this Court's order of April 27, 1983 and the citations therein.) This Court has given the Bank more than adequate time to exhaust remedies available under Bahamian law and to seek other measures under Caymanian law; the exhibits offered into evidence at the October 20th hearing indicated no such efforts past early June, 1983. Therefore, for the reason that this Court is not persuaded that the Bank has exercised good faith and for the reasons set forth in the 11th Circuit opinion on this issue, this Court concludes that the imposition of the sanction in this case does not violate due process.

Accordingly, it is

ORDERED AND ADJUDGED that:

1. The Bank of Nova Scotia's motion to supplement this Court's order of October 20, 1983 is granted; and,

2. This Court finds that the Bank of Nova Scotia has failed to make a good faith effort to comply with the subpoena issued in this matter.

DONE AND ORDERED at West Palm Beach, Florida, this 24th day of October, 1983.

JAMES C. PAINE /s/
United States District Judge

cc: Thomas Blair, Esq.
William Sadowski, Esq.
Danforth Newcomb, Esq.

APPENDIX E

Order of the
United States District Court
For the Southern District of Florida

IN RE GRAND JURY PROCEEDINGS

UNITED STATES

v.

THE BANK OF NOVA SCOTIA

Case No. 83-1(WPB) GJ

United States District Court,
S.D. Florida.

October 20, 1983

This cause came before the Court for a civil contempt hearing on October 20, 1983.

On October 10, 1983, this Court ordered the Bank of Nova Scotia ("The Bank") to comply with subpoena *duces tecum* 83-1 served on the Bank on March 4, 1983 no later than October 17, 1983. As of October 20, 1983, there is clear and convincing evidence that the Bank has not turned over the subpoenaed materials and thus, the Court finds the Bank in contempt of the order of October 10, 1983.

This Court must determine next the sanction most likely to coerce the Bank into compliance with the order, bearing in mind that the nature and purpose of civil contempt, and the sanctions imposed because of it, are coercive and seek to obtain compliance with the court's order. *Smith v. Sullivan*,

611 F.2d 1050, 1053 (5th Cir.1980) (citations omitted). *See, also United States v. Roux Laboratories*, 456 F.Supp. 973, 978 (M.D. Fla.1978).

This judgment of civil contempt, and the imposition of sanction that it carries are always conditional and contingent, remediable and able to be purged by compliance with this Court's order. *United States v. Roux Laboratories, supra*, 456 F.Supp. at 978. The crux of what this Court seeks in this order is the submission of the subpoenaed materials to the grand jury and not the punishment of the Bank.

Accordingly, it is ORDERED and ADJUDGED that

1. the Bank of Nova Scotia is hereby held in civil contempt;

2. a sanction in the form of a fine of $25,000.00 per day is hereby imposed, to take effect on October 26, 1983; and,

3. this order is signed and continuing until the Bank purges itself of civil contempt by complying with this Court's order of October 10, 1983, or continuing until the date this Grand Jury expires, whichever may be sooner.

DONE and ORDERED in Miami, Florida, this 20th day of October, 1983.

JAMES C. PAINE /s/

United States District Judge
James C. Paine

cc: Thomas Blair, Esq.
William Sadowski, Esq.
Henry Harfield, Esq.

APPENDIX F

Order of the
United States District Court
for the Southern District of Florida

IN RE GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA

v.

THE BANK OF NOVA SCOTIA

Case No. 83-1(WPB)

United States District Court,
S.D. Florida.

October 10, 1983

This cause came before the Court on motion by the government to compel compliance with grand jury subpoena, filed May 6, 1983, and on motions by the Bank of Nova Scotia ("the Bank") for order containing findings, directing government to act, for further enlargement of time or, alternatively, to be relieved from further obligations under order and subpoena, filed June 1, 1983.

On April 27, 1983, this Court denied the Bank's motion to quash the subpoena duces tecum 83-1, served on the Bank on March 4, 1983, and ordered the Bank to comply with said subpoena no later than May 31, 1983. On June 1, 1983, this Court held a hearing at which the Bank filed the instant motions and presented evidence and argument. At the conclusion of the hearing, this Court reserved ruling on these motions.

After review of the motions, evidence and argument presented this Court is of the view that the government has done all that it is required to do by law and by this Court's order of April 27, 1983 in connection with the enforcement of its subpoena. There can be no doubt that the Bank must comply with the subpoena. Thus, it appears that the course followed by this Court in *In re: Grand Jury Proceedings*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 103 S.Ct. 3086 (1983) must be followed here: the Bank will be given a brief period of time in which to comply with the subpoena and, at the expiration of that period, a contempt order will issue if the subpoena has not been complied with.

Accordingly, it is

ORDERED AND ADJUDGED that:

1. The motion by the government to compel compliance with grand jury subpoena is granted.

2. The motions by the Bank for order containing findings, directing government to act, for further enlargement of time or, alternatively, to be relieved from further obligations under order and subpoena are all denied.

3. The Bank is directed to comply with subpoena duces tecum 83-1 served on the Bank on March 4, 1983 no later than October 17, 1983.

4. A contempt hearing shall be held before this Court on October 21, 1983 at 3:30 p.m. in Courtroom X, Miami, Florida, unless this Court receives notification by both parties of the Bank's compliance with the subpoena before that time.

DONE AND ORDERED at West Palm Beach, Florida this 10th day of October, 1983.

JAMES C. PAINE /s/
United States District Judge

cc: Thomas Blair, Esq.
William Sadowski, Esq.
Henry Harfield, Esq.

APPENDIX G

Order of the
United States District Court
for the Southern District of Florida

IN RE GRAND JURY PROCEEDINGS

UNITED STATES

v.

BANK OF NOVA SCOTIA

Case No. 83-1(WPB)

United States District Court,
S.D. Florida.

April 27, 1983

This cause came before the court on motion by the Bank of Nova Scotia ("The Bank") directed to subpoena 83-1, filed April 4, 1983.

The Bank seeks an order quashing the subpoena duces tecum served on it on March 4, 1983. Many of the same arguments raised by the Bank in this motion were resolved against it by the 11th Circuit in a similar case: *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384 (11th Cir.1982). For the reasons stated in that case, this court will decline to quash the subpoena notwithstanding that compliance would allegedly require the Bank to violate foreign bank secrecy laws. *Id.* Additionally, this court has not the authority to require the government to demonstrate the materiality and necessity of the subpoenaed documents to the grand jury investigation. *Id.* at 1387 (citations omitted).

Since the Bank may very well face difficulty in producing the subpoenaed documents, additional time will be granted in which to comply. Because the government may very well be able to assist the Bank in obtaining the documents, the government will be required to provide any reasonable assistance, especially in dealing with the foreign governments; however, the government is not required to forward letters rogatory. *See, United States v. Vetco, Inc.* 644 F.2d 1324, 1332-1333 (9th Cir. 1981).

Accordingly, it is ORDERED and ADJUDGED that

1) the motion by the Bank to quash the subpoena duces tecum 83-1, served on the Bank on March 4, 1983 is denied;

2) the Bank's motion for an extension of time in which to respond to said subpoena is granted; the Bank shall comply with said subpoena no later than May 31, 1983; and,

3) the government shall provide any reasonable assistance to the Bank in obtaining the subpoenaed documents but is not required to forward letters rogatory.

DONE and ORDERED at West Palm Beach, Florida, this 27th day of April, 1983.

JAMES C. PAINE /s/

United States District Judge
James C. Paine

cc: Thomas Blair
William Sadowski
Henry Harfield

/

APPENDIX H

U.S. Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX I

Federal Rule of Criminal Procedure 42(b)

Rule 42. Criminal Contempt

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

APPENDIX J

Federal Rule of Criminal Procedure 17(g)

Rule 17. Subpoena

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

APPENDIX K

Federal Rule of Civil Procedure 45(f)

Rule 45. Subpoena

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

APPENDIX L

Section 10, The Banks and Trust Companies Regulation Act of the Bahamas (1965), *as amended*

10.—(1) No person who has acquired information in his capacity as—

(a) director, officer, employee or agent of any licensee or former licensee;

(b) counsel and attorney, consultant or auditor of the Central Bank of The Bahamas, established under section 3 of the Central Bank of The Bahamas Act, 1974, or as an employee or agent of such counsel and attorney, consultant or auditor;

(c) counsel and attorney, consultant, auditor, accountant, receiver or liquidator of any licensee or former licensee or as an employee or agent of such counsel and attorney, consultant, auditor, accountant, receiver or liquidator;

(d) auditor of any customer of any licensee or former licensee or as an employee or agent of such auditor;

(e) the Inspector under the provisions of this Act, shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions, accounts of a customer of a licensee or relating to any application by any person under the provisions of this Act, as the case may be, except—

(i) for the purpose of the performance of his duties or the exercise of his functions under this Act, if any; or

(ii) for the purpose of the performance of his duties within the scope of his employment; or

(iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within The Bahamas, or under the provisions of any law of The Bahamas.

(2) Nothing contained in this section shall—

(a) prejudice or derogate from the rights and duties subsisting at common law between a licensee and its customer; or

(b) prevent a licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.

(3) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offence against this Act and shall be liable on summary conviction to a fine not exceeding fifteen thousand dollars or to a term of imprisonment not exceeding two years or to both such fine and imprisonment.

APPENDIX M

Cayman Islands Confidential Relationships (Preservation) Law (1976), *as amended*, Confidential Relationships (Preservation) (Amendment) Law (1979);* Practice Note from the Clerk of the Grand Court, Cayman Islands

A Law to give sanction to the duty of non-divulgence of information imparted under conditions of professional confidence express or implied.

ENACTED by the Legislature of the Cayman Islands.

[short title

1. This Law may be cited as the Confidential Relationships (Preservation) Law]

short title

1. *This Law may be cited as the Confidential Relationships (Preservation) (Amendment) Law, 1979*

Interpretation.

2. In this Law, unless the context otherwise requires—

"bank" "licensee" and "trust company" have the meanings ascribed to them in the Banks and Trust Companies Regulation Law, 1966;

"business of a professional nature" includes the relationship between a professional person and a principal, however the latter may be described;

---

* This statute was intially passed by the Legislative Assembly on September 8, 1976, and was substantially amended on September 6, 1979. However, the Cayman Islands has not re-codified the statute. For the convenience of the Court, the statute, *as amended*, has been reprinted to reflect the 1979 amendments. Brackets indicate the deletions made in 1979; italics indicate additions.

"confidential information" includes information concerning any property which the recipient thereof is not, otherwise than in the normal course of business, authorized by the principal to divulge;

"criminal" in relation to an offence means an offence contrary to the criminal law of the Islands;

["entitled to possession of confidential information" means so entitled under the law of the Islands, in the normal course of business or by the specific consent of the relevant principal;]

"Governor" means the Governor in Council;

"Inspector" means the Inspector of Banks and Trust Companies and to the extent of his authorization every person authorized by the Governor to perform his functions as such;

"normal course of business" means the ordinary and necessary routine involved in the efficient carrying out of the instructions of a principal including compliance with such laws and legal process as arises out of and in connection therewith and the routine exchange of information between licensees;

"principal" means a person who has imparted to another confidential information in the course of the transaction of business of a professional nature;

"professional person" includes a public or government official, a bank, trust company, an attorney-at-law, an accountant, an estate agent, an insurer, a broker and every kind of commercial agent and adviser whether or not answering to the above descriptions and whether or not licensed or authorized to act in that capacity and every person subordinate to or in the employ or control of such person for the purpose of his professional activities;

"property" includes every present, contingent and future interest or claim, direct or indirect, legal or equitable, positive or negative, in any money, moneys worth, realty

or personalty, movable or immovable, rights and securities thereover and all documents and things evidencing or relating thereto.

Application and scope.

3. (1) [This] *Subject to subsection (2), this* Law has application to all confidential information with respect to business of a professional nature which arises in or is brought into the Islands and to all persons coming into possession of such information at any time thereafter whether they be within the jurisdiction or thereout.

[(2) This Law has no application, unless otherwise herein provided, to confidential information received or given—

(a) to any professional person acting in the normal course of business or with the consent, express or implied, of the relevant principal;

(b) to constables investigating offences committed or alleged to have been committed within the jurisdiction;

(c) to constables, specifically authorized by the Governor in that behalf, investigating an offence committed or alleged to have been committed outside the jurisdiction which if committed in the Islands would be a criminal offence;

(d) to the Financial Secretary or the Inspector.]

(2) This Law has no application to the seeking, divulging, or obtaining, of confidential information—

(a) in compliance with the directions of the Grand Court pursuant to section 3A:

(b) by or to—

(i) any professional person acting in the normal course of business or with the consent, express or implied, of the relevant principal;

(ii) a constable of the rank of Inspector or above investigating an offence committed or alleged to have been committed within the jurisdiction;

(iii) a constable of the rank of Inspector or above, specifically authorised by the Governor in that behalf, investigating an offence committed or alleged to have been committed outside the Islands which offence, if committed in the Islands, would be an offence against its laws; or

(iv) the Financial Secretary, the Inspector or, in relation to particular information specified by the Governor, such other person as the Governor may authorise;

(v) a bank in any proceedings, cause or matter when and to the extent to which it is reasonably necessary for the protection of the bank's interest, either as against its customers or as against third parties in respect of transactions of the bank for, or with, its customer;

(vi) the relevant professional person with the approval of the Financial Secretary when necessary for the protection of himself or any other person against crime: or

(c) in accordance with the provisions of this or any other Law.

3A. (1) Whenever a person intends or is required to give in evidence in, or in connection with, any proceeding be being tried, inquired into or determined by any court, tribunal or other authority (whether within or without the Islands) any confidential information within the meaning of this Law, he shall before so doing apply for directions and any adjournment necessary for that purpose may be granted.

(2) Application for directions under subsection (1) shall be made to, and be heard and determined by, a Judge of

the Grand Court sitting alone and in camera. *At least seven day's notice of any such application shall be given to the Attorney General and, if the Judge so orders, to any person in the Islands who is a party to the proceedings in question. The Attorney General may appear as* amicus curiae *at the hearing of any such application and any party on whom notice has been served as aforesaid shall be entitled to be heard thereon, either personally or by counsel.*

(3) Upon hearing an application under subsection (2) a Judge shall direct—

(a) that the evidence be given; or

(b) that the evidence shall not be given; or

(c) that the evidence be given subject to conditions which he may specify whereby the confidentiality of the information is safeguard.

(4) In order to safeguard the confidentiality of a statement, answer or testimony ordered to be given under subsection (3) (c) a Judge may order—

(i) divulgence of the statement, answer or testimony to be restricted to certain named persons;

(ii) evidence to be taken in camera; *and*

(iii) reference to the names, addresses and descriptions of any particular persons to be by alphabetical letters, numbers or symbols representing such persons the key to which shall be restricted to persons named by him.

(5) Every person receiving confidential information by operation of subsection (2) is as fully bound by the provisions of this Law as if such information had been entrusted to him in confidence by a principal.

(6) In considering what order to make under this section a Judge shall have regard to—

(a) whether such order would operate as a denial of the rights of any person in the enforcement of a just claim;

(b) any offer of compensation or indemnity made to any person desiring to enforce a claim by any person having an interest in the preservation of secrecy under this Law;

(c) in any criminal case, the requirements of the interests of justice.

(7) In this section, unless the context otherwise requires—

"court" bears the meaning ascribed to it in section 2 of the Evidence Law;

"given in evidence" and its cognates means make a statement, answer an interrogatory or testify during or for the purposes of any proceeding;

"proceeding" means any court proceeding, civil or criminal and includes a preliminary or interlocutory matter leading to or arising out of a proceeding.

Offences and penalties.

4. (1) Subject to the provisions of sub-section (2) of section 3, whoever—

(a) being in possession of confidential information however obtained;

(i) divulges it; or

(ii) attempts, offers or threatens to divulge it [to any person not entitled to possession thereof;]

(b) willfully obtains or attempts to obtain confidential information [to which he is not entitled;]

is guilty of an offence and liable on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 2 years or both.

(2) Whoever commits an offence under sub-section (1) and receives or solicits on behalf of himself or another

any reward for so doing is liable to double the penalty therein prescribed and to a further fine equal to the reward received and also to forfeiture of the reward.

(3) Whoever, being in possession of confidential information, clandestinely, or without the consent of the principal, makes use thereof for the benefit of himself or another is guilty of an offence and on summary conviction liable to the penalty prescribed in sub-section (2) and for that purpose any profit accruing to any person out of any relevant transaction shall be regarded as a reward.

(4) Whoever being a professional person, entrusted as such with confidential information, the subject of the offence, commits an offence under subsections (1), (2) or (3) is liable to double the penalty therein prescribed.

(5) For the removal of doubt it is declared that, subject to subsection (2) of section 3, a Bank which gives a credit reference in respect of a customer without first receiving the authorization of that customer is guilty of an offence under subsections (1) and (4).

[Savings.

5. Nothing in this Law shall by implication be deemed to derogate from the rule in Tournier v. National Provincial and Union Bank of England (1924) 1KB, 461, (which deals with the civil duty of banks to preserve the confidentiality of the business of their customers) which rule is declared to have application to the Islands.]

Regulations.

6. The Governor may make regulations for the administration of this Law.

Attorney General's fiat.

7. No prosecution shall be instituted under this law without the consent of the Attorney General.

PRACTICE NOTE

TO: ALL ATTORNEYS-AT-LAW

SECTION 3A OF THE CONFIDENTIAL RELATIONSHIPS (PRESERVATION) LAW

I have been directed by the Honourable the Chief Justice to bring to the attention of practitioners that where directions are sought under section 3A of the Confidential Relationships (Preservation) Law the documents accompanying the application should normally:

(i) describe with particularity the nature of the evidence to be given (without divulging the confidential information concerned) e.g. "to reveal the names of the settler and the beneficiaries of a trust made on the . . . day of . . . in respect of which the applicant is a trustee" or "to reveal transactions reflected in the accounts of . . . concerning the deposit and withdrawal of money on the . . . day of . . . and on the . . . day of . . . "

(ii) disclose whether or not the person likely to be affected by the disclosure of the confidential information is a party to the cause or action in respect of which it is proposed to adduce the evidence.

(iii) set out the grounds on which it is sought to justify the disclosure; and these would normally have to be substantial where disclosure relates to the confidential affairs of a person who is not a party to the proceedings in respect of which it is sought.

(iv) specify whether the person likely to be affected by the disclosure is in the Islands.

(v) indicate the relevance of the evidence sought to be disclosed to the proceedings concerned with particular reference to paragraphs (a) or (c) of section 3A (6).

DATED the 29th Day of April 1982.

CLERK OF THE COURT.

APPENDIX N

Orders of the Grand Court, Cayman Islands

IN THE GRAND COURT
CIVIL JURISDICTION
CAUSE NO. 187 OF 1983
IN CHAMBERS

In the Matter of the Confidential Relationships (Preservation) (Amendment) Law

—and—

In the Matter of subpoena duces tecum issued out of the United States District Court for the Southern District of Florida in Grand Jury Proceedings 83-1 (WPB) issued at the instance of the United States against the Bank of Nova Scotia

—and—

In the Matter of an application by the Bank of Nova Scotia for directions under S. 3A of the Confidential Relationships (Preservation) (Amendment) Law

ORDER OF COURT

Made the 11th November, 1983

Upon this application by The Bank of Nova Scotia coming before the Court this day And Upon hearing Mr. John Stafford for the Applicant and Mr. Richard Ground for the Attorney-General as amicus curiae And While this Court is

anxious to assist foreign tribunals in the due administration of justice it can only do so in accordance with local Law;

And While it is a provision of the local Law, namely Section 3A (6) (c), that before any direction for confidential information to be divulged in a criminal case the applicant for directions must show the Court that such divulgence is in the interests of justice;

And While the Court requires that the documents accompanying the application should set-out, inter alia, the grounds on which it is sought to justify the divulgence namely in a criminal case that the evidence sought is relevant to specific allegations of a criminal offence which if committed in the Islands would be an offence contrary to our Law and indicate the relevance of the evidence sought to be disclosed to the proceedings concerned;

And While the Court has given careful consideration to the additional material contained in Mr. Stafford's affidavit including a copy of the emergency motion to vacate the stay filed before the United States Court of Appeals Eleventh Circuit;

This Court is unable to satisfy itself at present that there are any grounds for divulgence or that the evidence sought is relevant to any criminal proceedings IT IS ORDERED that the earlier Order of this Court made the 31st May 1983 in this Cause continue with full effect.

This Order is without prejudice to the renewal of this application in the event that the prosecuting authorities supply the applicant with material from which it might satisfy this Court as required by Law.

General liberty to apply.

Liberty to produce a sealed copy of this Order and of the Order dated the 31st May 1983 to the United States Attorney having conduct of proceedings No. 83-1 (WPB) and to any Court concerned therewith.

/s/

Acting Chief Justice

IN THE GRAND COURT
CIVIL JURISDICTION
CAUSE NO. ___ OF 1983
IN CHAMBERS

In the Matter of the
Confidential Relationships (Preservation) Law

—and—

In the Matter of a subpoena duces tecum issued out of the United States District Court for the Southern District of Florida in Grand Jury Proceedings 83-1 (WPB) issued at the instance of the United States against the Bank of Nova Scotia

—and—

In the Matter of an application by the Bank of Nova Scotia for directions under S. 3A of the Confidential Relationships (Preservation) Law

ORDER OF COURT

Made the 31st day of May 1983

Upon the application by Bank of Nova Scotia for directions under the Confidential Relationships (Preservation) Law coming before the Chief Justice in Chambers this day And Upon reading the application and the affidavit of Mr. John Alder in support thereof And Upon hearing Mr. John Stafford for the applicant and Mr. Richard Ground for the Attorney General And it appearing from the application that the said proceedings may involve investigating whether an offence has been committed in connection with trafficking in narcotics as well as

in connection with the inland revenue of the United States IT IS HEREBY ORDERED that The Bank of Nova Scotia be directed not to communicate in contravention of the said Confidential Relationships (Preservation) Law any information concerned with the conduct of its business in the Cayman Islands to any person outside the jurisdiction of this Court and The Bank of Nova Scotia is further directed that it may not produce in contravention of the said Confidential Relationships (Preservation) Law any books or records presently pertaining to its business in the Cayman Islands or any copies or extracts thereof and particularly not of any account kept in the names of Frank J. Brady, Paula Brady, Frank J. Brady Enterprises Inc., Brady Farms Inc. and/or Clay Island Farms, Inc., or West Indies Island Tourist Company Ltd. at the local branch of the said bank without the further order of this Court.

The foregoing order relates solely to the said subpoena duces tecum and matters related thereto and connected therewith pending identification by the United States of the confidential information sought to be released and establishment of justification for such release pursuant to section 3A (6) of the said Confidential Relationships (Preservation) Law when further application may be made for its release.

And It Is Further Ordered that the applicant be at liberty to produce a sealed copy of this order to the United States attorney having conduct of proceedings No. 83-1 (WPB) before the Grand Jury in the United States District Court for the Southern District of Florida.

Liberty to the Attorney General and The Bank of Nova Scotia to apply.

/s/

Chief Justice

APPENDIX O

Rule 28.1 Listing of Parents, Subsidiaries and Affiliates of the Bank of Nova Scotia

Amaco (Netherlands) B.V.
Antillean Management Corporation "AMACO" N.V.
The Bank of N.T. Butterfield & Son Limited
The Bank of Nova Scotia Jamaica Limited
The Bank of Nova Scotia Trust Company Jamaica Limited
The Bank of Nova Scotia Trinidad & Tobago Limited
The Bank of Nova Scotia Trust Company of the West Indies Limited
Brunswick Square Limited
Canborough Limited and the Canborough Corporation
Caribbean Credit Corporation N.V.
Caribbean Financial Services Corporation Limited
Caribbean Mercantile Bank N.V.
Caribbean Mercantile Trust Company N.V.
Chargex Limited
Export Finance Corporation of Canada Limited
Fredericton Developments Limited
ICIC Holdings Limited
Industrial Credit Insurance Company
Maduro & Curiel's Bank N.V.
Maduro & Curiel's Bank (Bonaire) N.V.
Maduro & Curiel's (Bonaire) Trust N.V.
Maduro & Curiel's Insurance Services N.V.
Maduro & Curiel's Trust Company N.V.
N.V. De Curacaosche Hypotheekbank
N.V. De Spaar En Beleenbank Van Curacao
N.V. Trust—En Administratie Maatschappij Van Maduro & Curiel's Bank N.V.
Pan Caribbean Merchant Bank Limited
Progress N.V.
Schroder, Darling and Company Holdings Limited
Schroder, Darling and Company Limited

Scotia Centre Limited
Scotia-Toronto Dominion Leasing Limited
Scotiabank de Puerto Rico
Singapore Gold Clearing House Private Limited
VCDL Investment Limited
The West India Company of Merchant Bankers Limited
The Windward Islands Bank Limited

CERTIFICATE OF SERVICE

I, Henry Weisburg, a member of the Bar of this Court, certify that three copies of the annexed petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit have been served this ____ day of August, 1984, by mail, postage prepaid, upon the following counsel:

Linda Collins Hertz
Assistant United States Attorney
155 South Miami Avenue
Miami, Florida 33130-1693

Solicitor General of the United States
U.S. Department of Justice
Room 5139
Main Justice Building
Washington, D.C. 20530

Attorneys for Respondents

_____

Henry Weisburg

No. 84-329

Office-Supreme Court, U.S.
FILED
SEP 28 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE GRAND JURY PROCEEDINGS
THE BANK OF NOVA SCOTIA

THE BANK OF NOVA SCOTIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CANADIAN BANKERS' ASSOCIATION

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Robert W. Brundige, Jr.

September 28, 1984

BEST AVAILABLE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-329

IN RE GRAND JURY PROCEEDINGS
THE BANK OF NOVA SCOTIA

THE BANK OF NOVA SCOTIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CANADIAN BANKERS' ASSOCIATION

INTRODUCTION

The Canadian Bankers' Association ("CBA") respectfully submits this brief as *amicus curiae* in connection with the Court's consideration of the petition of The Bank of Nova Scotia (the "Bank") for a writ of certiorari.[1] CBA supports the petition and respectfully requests that it be granted.

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1 Petitioner and respondent have consented to the appearance of CBA as an *amicus*, and written consents are on file with this Court. CBA previously appeared as an *amicus* in proceedings below, supporting the Bank before the district court and the United States Court of Appeals for the Eleventh Circuit.

CBA's INTEREST

CBA is a corporation organized in 1900 under a statute enacted by the Parliament of Canada. Its members consist of Canadian banks and Canadian subsidiaries of United States and foreign banks. CBA, among other things, represents the interests of the Canadian banking industry both in Canada and abroad.

Most of CBA's largest members have branches or agencies in the United States and in various other countries who have friendly relations with the United States. It is the policy of these members to conduct business in full compliance with the laws and regulations of all countries in which they do business.

Unlike the United States, some of the countries in which members of CBA do business, such as The Commonwealth of the Bahamas and the Cayman Islands, have stringent financial privacy laws which prohibit a bank from disclosing records relative to a customer's account unless the customer authorizes, or a court of competent jurisdiction in such countries orders, disclosure. Failure to comply with such laws can result in severe criminal sanctions and other substantial penalties including loss of license to engage in the banking business in the country whose law has been violated.

CBA's interest in this matter arises from the fact that branches and agencies of members of CBA located in the United States are frequently served with process, including grand jury subpoenas, trial subpoenas and IRS summonses, demanding production in the United States of records and documents located outside the United States in jurisdictions whose financial privacy laws prohibit such production. It is only happenstance that it was the Bank rather than any one of several other members of CBA which was confronted with the dilemma that arose in the proceedings below.

The decision of the Eleventh Circuit has a direct impact on all members of CBA who do business in the United States and

in other countries which have financial privacy laws backed by criminal and other sanctions. The decision would compel every member of CBA who may find itself in the same situation as the Bank to violate the laws of other friendly nations. It would require such members to incur substantial criminal and civil penalties notwithstanding that the members have made every reasonable effort to comply with the laws of this country and those of the other friendly nations involved.

Accordingly, CBA is deeply concerned about and vitally interested in this matter, the significance and ramifications of which are far-reaching.

ARGUMENT

THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH PRINCIPLES OF LAW INVOLVING BASIC CONCEPTS OF DUE PROCESS AND FAIRNESS AND PRECEPTS OF INTERNATIONAL LAW LAID DOWN BY THIS COURT AND OTHER CIRCUIT COURTS

The basic issue raised by the decision below is whether a neutral non-party witness can be held in civil contempt for failure to produce subpoenaed records when the criminal financial privacy laws and judicial decisions of the country where the subpoenaed records are located prohibit such production without the permission of a court of competent jurisdiction in such country, and the United States government which caused the subpoena to be issued refuses either (i) to provide reasonable assistance to the witness in its efforts to obtain the requisite foreign court approval or (ii) to pursue other effective alternative means available to obtain the subpoenaed records on a government-to-government basis.

In resolving this issue in the affirmative, the Eleventh Circuit has raised questions of federal law which only this Court can and should resolve. These questions have Constitutional dimensions, involving basic concepts of due process and fairness. The decision below also raises issues of international law that require review and resolution by this Court. The schism be-

tween the principles of law enunciated by the Eleventh Circuit and those laid down by this Court in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958) [hereinafter cited as *"Rogers"*], and by other Circuits, has created apprehension and uncertainty for all foreign business entities that are doing business both in the United States and in other countries which have strict criminal financial privacy laws. It is a situation which is in need of clarification and amelioration by this Court.

This Court has recognized there are constitutional limits which courts in the United States must observe in determining whether to impose sanctions on parties and witnesses who have made good faith attempts to comply with process requiring production of documents in violation of the laws of a foreign nation. *Rogers*, 357 U.S. 197 (1958). In *Rogers*, *Id.*, this Court held that sanctions may not be imposed on a party who made a good faith attempt to comply with a discovery order requiring violation of foreign law. In so doing, this Court stated:

> It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.

357 U.S. at 211-12

The principles set forth by this Court in *Rogers* are reflected in both Comment c to § 40 of the *Restatement (Second) of Foreign Relations Law of the United States* (1965) (hereinafter the "Restatement") and § 420(2) of the *Restatement (Revised) of Foreign Relations Law of the United States* (Tent. Draft 3, 1982) (hereinafter the "Tentative Revised Draft of the Restatement").

Comment c to § 40 provides in pertinent part that:

> In determining whether to refrain from exercising jurisdiction, a state must give special weight to the nature of the penalty that may be imposed by the other state. A state will be less likely to refrain from exercising its

> jurisdiction when the consequence of obedience to its order will be a civil liability abroad. Similarly, a state will be less likely to exercise jurisdiction, where there is a possibility that obedience to its command may put an alien in jeopardy under the criminal laws of its own country, than it will if one of its own nationals may be subjected to foreign liability under similar circumstances.

Similarly, § 420(2) of the Tentative Draft of the Restatement states:

> If disclosure of information located outside the United States is prohibited by a law or regulation of the state in which the information or prospective witness is located, or by the state of nationality of the prospective witness:
>
> . . .
>
> (b) the court may not ordinarily impose the sanction of contempt, dismissal or default on the party that has failed to comply with the order for production, except in cases of deliberate concealment or of removal of information or of failure to make a good faith effort [to secure permission from the foreign authorities to make the information available].

In its decision below, the Eleventh Circuit totally disregarded the principles of *Rogers* and the guidelines set forth in Comment c to § 40 of the Restatement and § 420(2) of the Tentative Revised Draft of the Restatement. The Eleventh Circuit seems to suggest that nothing short of production of the documents in violation of the criminal laws of the Cayman Islands would enable the Bank to avoid contempt sanctions. It gives no weight to the determined efforts of the Bank to obtain judicial approval of production of the subpoenaed documents in conformity with the procedures prescribed by the financial privacy laws of the Cayman Islands. Moreover, adhering to the view that a grand jury, regardless of the circumstances, should be allowed unfettered investigatory powers that reach outside the United States and cross the borders of other friendly

nations, the Eleventh Circuit approved the refusal of the government to provide information to the Bank sufficient to enable it to successfully apply in the Cayman Islands for judicial approval of production of the subpoenaed documents in the United States. The Eleventh Circuit also rejected the proposition that, notwithstanding the complications posed by the financial privacy laws of the Cayman Islands, the government properly insisted on strict compliance with the grand jury subpoena and was not obliged to use a procedure previously agreed to by the Cayman government pursuant to which the subpoenaed documents could be obtained on a government-to-government basis.

In essence, the Eleventh Circuit is committed to the notion that the financial privacy laws of friendly nations which are backed by substantial criminal sanctions are and should be no obstacle to grand jury investigations and constitute no excuse for failing to comply with process or court orders issued in the United States. This notion is in conflict with the views expressed by this Court in *Rogers*, *supra*, to the effect that fear of criminal prosecution constitutes a "weighty excuse" for failure to comply with process or court orders. This notion also is at war with the guidelines reflected in the Restatement and the Tentative Revised Draft of the Restatement. There is pressing need for a reconciliation of these conflicting views which only this Court can provide.

The decision of the Eleventh Circuit also conflicts with decisions of other circuits.

In *United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983), the Seventh Circuit reversed the order of the district court which enforced process requiring a bank to produce in the United States documents located in its branch in Athens, Greece, where compliance would subject employees of the bank in Athens to the risk of substantial criminal sanctions under the laws of Greece. The Seventh Circuit deemed it "significant" that the bank's employees would be exposed to criminal sanctions and that the bank and its employees were

involved only as "neutral sources of information." 699 F.2d at 346. Those are factors which the Eleventh Circuit in its decision below effectively deems insignificant.

Similarly, the Eleventh Circuit decision radically parts company and is in conflict with decisions rendered in the Second Circuit, especially with respect to principles of comity and international law, and reflects an unprecedented insensitivity to the concerns of the international business and banking community and the legitimate interests of nations friendly to the United States.

In *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960), the Second Circuit refused to enforce subpoenas served upon New York agencies of several Canadian banks which sought production in New York of bank records maintained at branches of those banks in Canada. In so doing, the Court concluded:

> Upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures.

282 F.2d at 152 (citations omitted).

The principles laid down in *Ings*, *supra*, were subsequently reaffirmed in *Application of Chase Manhattan Bank*, 297 F.2d 611, 613 (2d Cir. 1962), in which the Second Circuit affirmed an order modifying a federal grand jury subpoena so as not to require the production of records held in a branch of a United States bank in Panama in violation of the laws of Panama. The Second Circuit stated:

> This Government, as well as other litigants, has a real interest in civil and criminal cases in obtaining evidence wherever located. However, we also have an obligation to respect the laws of other sovereign states even though they may differ in economic and legal philosophy from our own.

297 F.2d at 613.

These principles, although seemingly not recognized by the Eleventh Circuit, are not unique to the jurisprudence of the United States. The very same tenets of comity and international law are recognized and upheld by other sovereign members of the international community. In *Frischke et al. v. Royal Bank of Canada et al.*, (1978) 17 O.R.(2d) 388 (Ont. C.A.), the Court of Appeals in Ontario, Canada reversed the order of a lower court which directed a Canadian bank and its officers to produce documents from its branch in Panama in violation of the laws of Panama. That court said:

> An Ontario court would not order a person here to break our laws; we should not make an order that would require someone to compel another person in that person's jurisdiction to break the laws of that State. We respect those laws. The principle is well recognized.

17 O.R. (2d) at 397.

Cf. *Rio Tinto Zinc Corp. v. Westinghouse Electronic Corp.*, (1978) A.C. 547 (H.L.); *Ralli Bros. v. Compania Naviera Sota Y Aznar*, (1920) 2 K.B. 287, 304 (C.A.).

The conflict between the Eleventh Circuit and other circuits makes it imperative for this Court to establish clear guidelines for neutral witnesses, the government and the courts which (i) assure due process to disinterested witnesses, (ii) respect the legitimate interests of other friendly nations as reflected by their laws and (iii) do not unduly fetter criminal investigations conducted in the United States. Without such guidance, the Bank and members of CBA, who in the future may be confronted with the same Hobson's choice imposed on the Bank, will continue to be placed in jeopardy.[2] Accordingly, there is an acute need for this Court to intervene.

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2 It is noteworthy that, in addition to certain Canadian banks, numerous foreign, non-Canadian banks have agencies located both in Miami, Florida and in countries, such as the Commonwealth of the Bahamas, the Cayman Islands and the Republic of Panama, which have strict financial privacy laws backed by criminal sanctions. All of these banks are subject to process issued in the Eleventh Circuit.

THE FINE IMPOSED IS UNWARRANTED, PUNITIVE IN NATURE AND A DENIAL OF PROCEDURAL DUE PROCESS

Even assuming that the order of civil contempt entered below was proper, the fine imposed upon the Bank in the amount of $1,800,000 is punitive in nature and, in the circumstances, totally inappropriate and unfair.

It is axiomatic that an order of civil contempt is designed to coerce a witness to comply with process. Unlike an order of criminal contempt, it is not intended to mete out punishment. When resistance to process ends and compliance begins, any rationale for continuing to hold a witness in civil contempt and imposing sanctions ceases. *Shillitani v. United States*, 384 U.S. 364 (1966).

The Bank ceased resisting the subpoena when it stopped invoking Cayman law as a ground for not complying with the subpoena and on November 17, 1983 produced all of the Cayman documents falling within the purview of the subpoena. This production was made only three days after the fine against the Bank became effective. Three days earlier the Bank had commenced the production of Bahamian documents. Subsequently, as a result of its efforts to produce all documents as and when located, the Bank on December 5 produced additional Bahamian documents (many of which had been stored in a mislabeled box), and on January 25, 1984 produced carbon copies of Bahamian documents which had been previously furnished to the government. Nonetheless, instead of limiting the daily fine of $25,000 to the period from November 14 to November 17, when the Bank had ceased resisting the subpoena and had produced all Cayman and Bahamian documents known by the Bank at that time to exist, the district court imposed the daily fine of $25,000 from November 14, 1983 (when the fine became effective) to January 25, 1984 (when carbon copies of previously produced documents were submitted to the government).

By any objective standard, the daily fine imposed for the period from November 17 to January 25 constitutes punishment. There is nothing in the record of these proceedings which suggests that the Bank, after it ceased resisting the subpoena on November 17, did anything other than use its best efforts to locate and produce all subpoenaed records. It would appear that the Bank is being punished because of its failure to have an efficient system for storing and locating inactive records and documents and not because it was resisting compliance with the subpoena. This is of grave concern to CBA because it is common knowledge among members of the international banking community that branches and agencies of banks located in such off-shore jurisdictions as the Bahamas and the Cayman Islands do not have the benefit of a document retrieval system supported by a sophisticated computer operation. Most, if not all, branches and agencies of banks in those countries follow the same practice employed by the Bank relative to documents and records that are no longer current. Such materials are placed in cartons which in turn are stored in warehouses. This system is vulnerable to human error such as misplacing of documents and mislabeling of cartons. Retrieval of old documents and records so stored is essentially a manual operation which consumes many man-hours over periods of days and weeks of effort which can become extended when documents are misfiled or cartons mislabeled. Consequently it is manifestly unfair to fine the Bank or any other bank which becomes similarly situated for its inability to retrieve documents with the speed and accuracy otherwise afforded by a computerized system.

From the perspective of CBA, the fine as computed and imposed is unfair, repressive and punitive. It goes far beyond anything resembling a civil contempt sanction. It is essentially a criminal contempt sanction which was applied without according the Bank the procedural due process to which it is entitled. This Court should intervene and remedy the situation.

CONCLUSION

The petition for certiorari should be granted and, upon review, the decisions of the court of appeals and the district court should be reversed.

Dated: September 28, 1984

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE GRAND JURY PROCEEDINGS
THE BANK OF NOVA SCOTIA.

THE BANK OF NOVA SCOTIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE CAYMAN ISLANDS AS AMICI CURIAE

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No. 84-329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE GRAND JURY PROCEEDINGS
THE BANK OF NOVA SCOTIA.

THE BANK OF NOVA SCOTIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE CAYMAN ISLANDS AS AMICI CURIAE

INTRODUCTION

The United Kingdom of Great Britain and Northern Ireland (the "United Kingdom") and the Cayman Islands ("Cayman") submit this brief as amici curiae in relation to the petition of the Bank of Nova Scotia (the "Bank") for a writ of certiorari.[1]

[1] Both petitioner and respondent have consented to the appearance of the United Kingdom and Cayman as amici curiae, and written consents are on file with the Clerk. The United Kingdom and Cayman previously appeared as amici in this matter before the United States Court of Appeals for the Eleventh Circuit and on remand before the United States District Court for the Southern District of Florida. The decision below is reported at 740 F.2d 817.

FACTS

The statement of the case and the facts relating to the documents located in Cayman (the "Cayman Brady documents") are generally set forth in the Bank's petition. Amici draw particular attention to the following.

Cayman criminal law prohibits a witness' production of confidential Cayman bank records to foreign tribunals, absent the Cayman Grand Court's permission or the consent of the witness' customer.[2] The Grand Court has regularly granted such permission in United States criminal cases as a matter of comity as the interests of justice so require.[3] However, "while th[e Grand] Court is anxious to assist foreign [United States] tribunals in the due administration of justice it can only do so in accordance with local [Cayman] law,"[4] which law, as con-

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[2] The [Cayman Islands] Confidential Relationships (Preservation) Law, 1976 (Law 16 of 1976); The [Cayman Islands] Confidential Relationships (Preservation) (Amendment) Law, 1979 (Law 26 of 1979) (collectively referred to in text, *infra*, as the "CR(P)L").

Compare United States v. Ghidoni, 732 F.2d 814 (11th Cir.), *petition for cert. filed*, 53 U.S.L.W. 3160 (U.S. Aug. 7, 1984) (No. 84-270) (criminal contempt) (compelling criminal defendant, a customer of the Bank, to execute "consent directive," waiving his rights under Cayman CR(P)L, does not violate defendant's Fifth Amendment rights) *with id.* at 819 (Clark, J., dissenting) (contra) *with In the Matter of Consent Directives Executed Pursuant to Orders of Foreign Courts*, Cause No. 269 of 1984, Civ. Jur. (Grand Ct., Cayman Islands, July 24, 1984) (the *"ABC Ltd. Case"*) (Summerfield, C.J.) ("On the face of it, the consent given in Ghidoni's case is consent given under compulsion and does not amount to consent for the purposes of our law.").

[3] *See, e.g., In the Matter of Proceedings Pending in the United States District Court for the Central District of California between United States of America and John Z. DeLorean, et al.*, Cause No. 118 of 1983, Civ. Jur. (Grand Ct., Cayman Islands, Apr. 19, 1983); cases *cited in* note 11 *infra*.

[4] *In the Matter of a Subpoena Duces Tecum issued out of the United States District Court for the Southern District of Florida in Grand Jury Proceedings 83-1 (WPB) issued at the instance of the United States against the Bank of Nova Scotia*, Cause No. 187 of 1983, Civ. Jur. (Grand Ct., Cayman Islands, in Chambers, Nov. 11, 1983); *accord In the matter of a Subpoena Duces Tecum issued out of the United States District Court for the Southern District of Florida in Grand Jury Proceedings 83-1 (WPB) issued at the instance of the United States against the Bank of Nova Scotia*, Cause No. 187 of 1983, Civ. Jur. (Grand Ct., Cayman Islands, in Chambers, May 31, 1983).

strued, requires a showing of materiality and relevance satisfactory to the Grand Court.[5]

Owing to Cayman bank secrecy legislation,[6] as construed by the Queen's judges in Cayman, the United States occasionally had difficulty prior to October 1982 in obtaining documentary information located in Cayman to support criminal prosecutions in the United States. To overcome these difficulties Cayman (with the consent of the United Kingdom) and the United States entered into an Agreement on October 5, 1982 (the "Cayman/U.S. Agreement").[7] The Cayman/U.S. Agreement provided procedures whereby the United States could obtain documents from Cayman in criminal investigations when criminality was common to both countries, including international narcotics trafficking offenses and international financial operations connected with drug abuse offenses. Cayman, by way of the United Kingdom, and the United States are also parties to the Single Convention on Narcotic Drugs, 1961, and to the amending Protocol of March 25, 1972 (collectively, the "Single Convention"),[8] which treaty established these trafficking and ancillary offenses as common to, *inter alia,* the United States and Cayman.[9]

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[5] *See, e.g.,* Practice Note to all Attorneys-At-Law, Grand Ct., Cayman Islands (Apr. 29, 1982) ("Section 3A of the [Cayman] Confidential Relationships (Preservation) Law").

[6] *See* Cayman CR(P)L *cited in* note 2 *supra.*

[7] Letter of D.H. Foster, Acting Governor of the Cayman Islands, to Michael Carpenter, Consul-General, United States Embassy, Kingston, Jamaica (Oct. 5, 1982) (the "Cayman/U.S. Agreement"). Cayman deemed itself bound by the agreement (*e.g.*, "Governor Lloyd clearly indicated the decision of the Cayman Islands to implement the working procedures . . . ." 740 F.2d at 829). *See* note 14 *infra.*

[8] Single Convention on Narcotic Drugs, 1961, *Done at New York* March 30, 1961, *entered into force with respect to the United States,* June 24, 1967, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 151; Amendment to Single Convention on Narcotic Drugs, 1961, *Protocol done* Mar. 25, 1972, *entered into force with respect to the United States,* Aug. 8, 1975, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 4.

[9] Single Convention, art. 36(2)(a)(ii), *in pari materia with id.*, art. 36(1), *explained in, e.g., Commentary on the Single Convention on Narcotic Drugs,* 1961 at 427-29, 432-34, U.N. Sales No. E.73.XI.1 (1973).

The Cayman documents requested in the subpoena related to two United States citizens (the "targets" or "Brady") and their corporations and were sought by the grand jury in connection with, and in anticipation of, a United States narcotics and tax evasion prosecution.[10]

In its search for documentary information in Cayman relating to the targets of the grand jury's investigation, the United States never used the provisions of either the Cayman/U.S. Agreement or the Single Convention or otherwise sought cooperation from the governments of Cayman or the United Kingdom. Yet at no time had the United States abrogated either this Agreement or this treaty, or otherwise advised amici that the United States would no longer adhere to the provisions thereof, whether on the ostensible grounds they were not as effective or efficient as unilateral extraterritorial grand jury subpoenas, or on any other grounds. Indeed, but for the Bank, Cayman might never have learned of the United States' attempt to force the Bank and its Caymanian employees to remove the Cayman Brady documents from Cayman soil in violation of Cayman law.

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[10] The United States eventually informed the Bank that the grand jury's "investigation involves apparent violations of both the tax and narcotics laws of the United States." Six months later, during the pendency of the Bank's subsequent appeal, it was disclosed that the United States expected that the subpoenaed records would disclose extensive unlawful money laundering by the targets and their corporations through the Bank's Bahamian and Caymanian branches in connection with the targets' drug trafficking operations between the Bahamas and the United States. The documents sought in the subpoena were further believed by the United States to be material to the narcotics importation offenses in that the Bank's records would provide evidence of the targets' personal involvement in moving the resultant drug profits among Cayman, the Bahamas, and the United States. According to the United States, the Bank maintained accounts of those targets, which accounts were utilized in international narcotics smuggling. These latter disclosures first appeared in an affidavit made by the United States, four days *after* the United States had formally advised the Governor of Cayman that "this case concerns the Bahamas and not the Cayman Islands" (which erroneous advice was never corrected by any further communication to Cayman). *See* Letter of Michael Carpenter, Consul General, United States Embassy, Kingston, Jamaica, to G. P. Lloyd, Governor of the Cayman Islands (Oct. 31, 1983).

When the Bank sought to discharge its statutory responsibilities under Cayman law by applying to the Cayman Grand Court for permission to release confidential account documents relating to Brady, the United States did not assist either the Bank or the Grand Court, despite notice of the Grand Court's procedures and contrary to longstanding United States practice.[11] On May 31, and November 11, 1983 the Cayman Grand Court expressly enjoined the Bank from releasing the Cayman Brady documents, stating that the Grand Court required evidence of criminality in order to issue the necessary order to allow the Bank to release documents.[12] The United States authorities took no steps to provide that evidence to the Bank or to the Cayman Grand Court.

On November 17, 1983, while this case was on appeal, the Governor of Cayman issued an unprecedented order pursuant to Cayman's bank secrecy statute, which the Grand Court held permitted the Bank to disclose the Cayman Brady documents to the United States. Accordingly, upon receipt of the Governor's

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[11] *See, e.g., In the Matter of a Subpoena issued out of the United States District Court for the* [*Venue Deleted*] [*Anonymous*] [*Parties Deleted*] [*U.S. Dist. Ct. Case No. Deleted*], Cause No. [Deleted] of 1984, Civ. Jur. (Grand Ct., Cayman Islands, Feb. 20, 1984) (citation redacted per Grand Court) (authorizing release of information for use in United States tax evasion prosecution ancillary to United States international narcotics trafficking prosecution). For earlier illustrative cases regarding customary United States practice, see, *e.g., In the Matter of a Subpoena Duces Tecum Dated 24th March, 1983 issued out of the United States District Court for the Northern District of Georgia at the instance of the United States against* [*Anonymous*] [*Deleted*], Cause No. [Deleted] of 1983, Civ. Jur. (Grand Ct., Cayman Islands, June 16, 1983); *In the Matter of a Subpoena Dated 21st April, 1983 issued out of the United States District Court for the Northern District of Georgia at the instance of the United States against* [*Anonymous*] [*Deleted*], Cause No. [Deleted] of 1983, Civ. Jur. (Grand Ct., Cayman Islands, Aug. 11, 1983); *In the Matter of the Subpoena issued by the United States District Court for the District of Columbia in Civil Case No. 81-342 between the United States v.* [*Anonymous*] [*Deleted*], Cause No. [Deleted] of 1982, Civ. Jur. (Grand Ct., Cayman Islands, Sept. 29, 1982); *In the Matter of an Application by* [*Anonymous*] [*Deleted*], Cause No. [Deleted] of 1983, Civ. Jur. (Grand Ct., Cayman Islands, Feb. 9, 1983) (re N.D. Ohio); *In the Matter of an Application by* [*Anonymous*] [*Deleted*], Cause No. [Deleted] of 1983, Civ. Jur. (Grand Ct., Cayman Islands, Mar. 10, 1983) (re C.D. Cal.); *In the Matter of an Application by* [*Anonymous*] [*Deleted*], Cause No. [Deleted] of 1983, Civ. Jur. (Grand Ct., Cayman Islands, May 25, 1983).

[12] *See* cases *cited in* note 4 *supra*.

order, the Bank and its Caymanian employees were no longer in imminent peril of criminal prosecution in Cayman if they produced the Cayman Brady documents to the grand jury.[13] They did so within hours. Nevertheless, following remand, the judgment of civil contempt against the Bank was affirmed.

The United States' disregard of the Cayman/U.S. Agreement, the Single Convention, and Cayman Grand Court's judgments created confusion and delay in the United States obtaining the information it desired, which was bound to operate in favor of other narcotics traffickers.[14]

The United Kingdom and Cayman therefore proposed to the United States a new procedure for United States authorities to follow to obtain documents concerning narcotics trafficking located in Cayman, which procedure was a logical extension of those contained in the Cayman/U.S. Agreement. In return the United States agreed not to enforce federal subpoenas issued in respect of documentary information in such cases. An agreement incorporating these features, informally known as the Cayman Narcotics Agreement 1984, came into force on August 29, 1984.[15]

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[13] *In the Matter of a Subpoena Duces Tecum issued out of the United States District Court for the Southern District of Florida in Grand Jury Proceedings 83-1 (WPB) issued at the instance of the United States against the Bank of Nova Scotia,* Cause No. 187 of 1983, Civ. Jur. (Grand Ct., Cayman Islands, in Chambers, Nov. 18, 1983).

[14] Even if the Cayman/U.S. Agreement did not bind the United States to utilize its procedures, Cayman deemed itself bound by them. *See* note 7 *supra.* The diplomatic channels provided by the Cayman/U.S. Agreement were thus always available to the United States. Cayman would undoubtedly have acted under the Cayman/U.S. Agreement to provide for release of the information sought in this case. Had Cayman not done so, the United Kingdom would certainly have insured such release by instructions to the Governor of Cayman. The information would have been in the hands of the Department of Justice in a matter of days from the date of the Department's first request to Cayman. In fact the United States has repeatedly secretly utilized the agreed procedures under the Cayman/U.S. Agreement in similar "narco-tax" cases, as well as numerous other kinds of criminal cases, to obtain the release of confidential government and private sector information and documents located in Cayman. *See, e.g.,* note 11 *supra* & note 20 *infra.*

[15] Exchange of Letters Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Concerning the Cayman Islands and Matters Connected

THE INTERESTS OF THE UNITED KINGDOM AND THE CAYMAN ISLANDS

Cayman is a dependent territory of the United Kingdom for whose external relations and vital interests the United Kingdom is responsible.[16] The United Kingdom is concerned that the banking and off-shore finance business of Cayman be conducted with full regard to Cayman's duty to the international community and, in particular, to the United States, to prevent the use of off-shore banking facilities by criminals engaged in money-laundering operations and to take all practicable measures for the prevention of abuse of drugs. To that end, Cayman legislation is examined closely and critically and is subject to the approval of the United Kingdom. The Cayman Confidential Relationships (Preservation) Law, 1976 and the Amendment thereto (collectively, the "CR(P)L")[17] were scrutinized with particular regard for the possible need of exempting from its provisions evidence in criminal prose-

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With, Arising From, Related To, or Resulting From any Narcotics Activity Referred to in the Single Convention on Narcotic Drugs, 1961 as amended by the Protocol Amending the Single Convention on Narcotic Drugs, 1961, *Done at London* July 26, 1984, *entered into force*, Aug. 29, 1984. The Agreement provides:

> 6.1 No federal subpoena (including a Grand Jury subpoena) related to documentary information located in Cayman in any matter falling within paragraph 2.1 of this Agreement will be enforced in the United States without the prior agreement of either the United Kingdom Government or the Cayman Government.

Cayman Narcotics Agreement, 1984, art. 6.1 ("Exclusivity").

Article 2.1 sets the scope of the Agreement as applying "to all offences or ancillary civil or administrative proceedings taken by the United States Government or its agencies connected with, arising from, related to, or resulting from any narcotics activity . . . ." *See generally* The [Cayman Islands] Narcotic Drugs (Evidence) (United States of America) Law, 1984 (Law 17 of 1984), passed by the Cayman Legislative Assembly Aug. 17, 1984, assented to by the Governor Aug. 27, 1984, effective Aug. 29, 1984.

[16] "This [District] Court concludes that the interests of the Caymans may also be characterized as 'vital.' " (Bank's Pet., App. 14b). So are the United Kingdom's interests. *See, e.g.*, The Constitution of the Cayman Islands §§ 1, 38-39, 49, 58, in The Cayman Islands (Constitution) Order 1972 [Schedule 2].

[17] *See* note 2 *supra*.

cutions, including drug offenses.[18] The Single Convention, the Cayman/U.S. Agreement, and the Cayman Narcotics Agreement 1984 all provide for securing to the United States authorities information in Cayman for use in international narcotics trafficking prosecutions in circumstances of strict security.

The United Kingdom and Cayman are seriously disturbed that the United States ignored the diplomatic channels provided by the Single Convention and the Cayman/U.S. Agreement in this case to obtain the Cayman Brady documents. They are equally disturbed by the United States' refusal, based on the unsustainable and inapposite argument of the secrecy of grand jury proceedings, to provide evidence to enable the Cayman Grand Court to authorize the timely release of those documents. Even if the Cayman/U.S. Agreement were not the exclusive method available to the United States, considerations of other international obligations and comity would suggest seeking evidence by way of the Cayman courts rather than by resorting to unacceptable and divisive unilateral methods.

In amici's view, the *proper* main object in *United States v. Brady*, No. 83-8067-CR-Hastings (S.D. Fla. filed Dec. 1, 1983) is interdictive action against pernicious international narcotics trafficking. But this action was in fact here achieved through the cooperative action of the Cayman Governor and will in the future be so achieved by comity by virtue of the conclusion of the Cayman Narcotics Agreement 1984 (and by Cayman's implementation of that Agreement by legislation). By contrast, the acts and omissions of the United States in the *Brady* case and this case remain unacceptable in both law and international comity.

Finally, amici wish this Court to be aware that these amici repeatedly faced a serious and discomforting dilemma in this case by virtue of their peculiar dual status as foreign sovereign and amici curiae. Directed by the United States to utilize amicus briefs, rather than diplomatic notes, to express their

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[18] *In the Matter of Proceedings Pending in the United States District Court for the District of Columbia between United States of America and Roy R. Carver, Joseph C. Lemire, et al.*, (C.A., Jamaica 1982).

views and representations to United States courts,[19] these amici have been required to deny the jurisdiction of the United States courts over them. Denying such jurisdiction, amici could not intervene as parties filing briefs qua parties or developing records before those same courts. Nevertheless, if the United Kingdom and Cayman were to present their views through amicus briefs, amici had to advise those courts what they believed to be the relevant facts and law, though such information, not being available to the subpoenaed party, was *de hors* the record.

Yet when these amici attempted to make these factual representations openly and in good faith in this case, their requests to do so were opposed by the United States at each stage. Moreover, on procedural grounds, amici's extra-record representations as to fact have been given little or no credence.[20] These circumstances have left amici uncertain as to the

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[19] *See, e.g.*, United States Department of State Circular, Diplomatic Note to Chiefs of Mission (Aug. 17, 1978) (Dept. of State File No. P 78-0154-2042), *reprinted in* M. Nash, *Digest of United States Practice in International Law 1978* Ch. 4, § 1, at 560 (Office of the Legal Adviser, Dept. of State) (1978), *reprinted in* M. Nash, *Contemporary Practice of the United States Relating to International Law*, 73 Am. J. Int'l. Law 122, 124 (1979); *accord* Formal Statement of Interest of the United States in *Westinghouse, Inc. v. Rio Algom Ltd.* (May 6, 1980), *reprinted in* 1980 Trade Reg. Rep. (CCH) ¶ 50,416.

[20] *See generally In re Grand Jury Proceedings, United States v. Bank of Nova Scotia*, 722 F.2d 655 (11th Cir. 1983) (remand order) ("[W]e are concerned that much relevant information was either not available or deliberately withheld or both."), *following remand*, 740 F.2d 817 (1984), *petition for cert. filed*, 53 U.S.L.W. 3369 (U.S. Aug. 31, 1984) (No. 84-329). The United States never produced all relevant information in its possession (most of it uniquely in its possession). Attempts by amici to redress this imbalance by offering to substantiate their representations by producing crucial and newly declassified documents in their possession (by way of affidavits) were repeatedly and successfully opposed by the United States. As a result, amici's materials, although compelling, were never accepted into the proceedings, the imbalance was therefore never redressed, and accordingly amici's representations were ignored. Cayman later filed these materials in the District Court in another similar case. *See Supplemental Record Information of the Cayman Islands as Amicus Curiae* (authenticated declassified affidavits of senior officials of the Cayman Government re the Cayman/U.S. Agreement and Single Convention), filed June 5, 1984 in *In re Grand Jury 83-4 (In the Matter of Ian N. Falconer)* ("*Falconer*"), No. FGJ-83-Roettger (S.D. Fla. filed Apr. 20, 1984); Address by E.J.E. Stowers, Q.P.M., Commissioner of Police, Royal Cayman Islands Police Force, to the Federal Bureau of

relevant procedures and disadvantaged as to the presentation of their arguments and facts in this case.[21]

Investigation at the FBI Academy in Quantico, Virginia (Nov. 17, 1982) (FBI training film re agreed procedures under the Cayman/U.S. Agreement) (FBI videotape and transcript filed by Cayman as amicus curiae in *Falconer*). *See generally* J. Harwood & B. Zagaris, *An Enforcement Round-up*, 59 Taxes International 79 (Sept. 84).

[21] *See also, e.g.*, Note, *Foreign Government Participation in United States Antitrust Litigation*, 15 J. Int'l. L. & Econ. 605 (1981) (warning of chilling effect that paradox described in the text may have on foreign sovereigns' willingness to express their views to the American judiciary). *Compare id. with* Letter of Davis R. Robinson, Legal Adviser, U.S. Dept. of State, to Chief Judge Edward T. Gignoux, [U.S. Ct. of App., 11th Cir.,] Chairman, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (May 23, 1983) (titled, "Amicus Curiae Appearances by Foreign Governments in U.S. Courts") *with* authorities *cited in* note 19 *supra*. No less disturbing to these amici is the increasing predilection of United States courts—invariably at the instance of the United States—to infer from the *absence* of foreign sovereign amici participation (or formal intervention) that the asserted vital foreign interests at stake must not be very vital after all. *See, e.g., United States v. First National City Bank*, 396 F.2d 897, 903-04 (2nd Cir. 1968), *followed in, e.g., United States v. Chase Manhattan Bank and FDC Co. Ltd.*, No. M-18-304 (S.D.N.Y. Mar. 27, 1984) ("By contrast, Hong Kong's interest in this matter is not quite as important [as the United States' interest] because there is no statute barring release of banking records and because the government of Hong Kong has not become a party to the case."), *consolidated appeals filed and oral argument docketed sub. nom. Garpeg Ltd. v. United States*, Nos. 84-6119, 84-6127, 84-6129 (2d Cir. filed Apr. 28, 1984). *But see, e.g., F.D.C. Co. Ltd. v. Chase Manhattan Bank*, Nos. 711, 712, 713 (Supreme Ct., High Ct. of Justice, Hong Kong 1984) (Clough, J.) (judgments entered Apr. 3, 1984 and Apr. 24, 1984) (orders continuing interim injunction), *interlocutory appeal docketed*, (C.A., High Ct. of Justice, Hong Kong filed Apr. 17, 1984); *F.D.C. Co. Ltd. v. Chase Manhattan Bank*, Nos. 711, 712, 713 (Supreme Ct., High Ct. of Justice, Hong Kong 1984) (judgment entered Aug. 7, 1984) (Clough, J.). *See generally X AG v. A Bank*, [1983] 2 All E.R. 464 (Q.B.Div. (Commercial Ct.) U.K.) (Leggatt, J.).

Even more recently the United Kingdom, the British Virgin Islands, and the United States have been discussing a United States subpoena served on Barclays Bank in *Felcyn v. United States*, No. 8456 Misc. (N.D. Cal. filed originally Nov. 29, 1983 in C.D. Cal. and transferred to N.D. Cal. June 28, 1984, consolidating Nos. C82-2674-RG (BX), C83-4140-RG (BX), and C83-4139-RG (BX)), with a view to resolving document production by diplomatic means. Concurrently with these discussions the United States served its applications to enforce the subpoena before the United States District Court

STATEMENT OF LAW

The United Kingdom and Cayman remain of the opinion that in this case the Court's decisions in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197 (1958) and *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964) prevail. These amici are also of the view that the neutral principles expressed in the Seventh Circuit's decision in *United States v. First National Bank of Chicago,* 699 F.2d 341 (7th Cir. 1983),[22] and the Third Circuit's *Schofield* decisions[23] should govern in this case.

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for the Northern District of California, representing to that court that the United Kingdom and the British Virgin Islands had no interest in this case as neither had appeared as amicus. That court, having now been informed that the United States' representation was inaccurate, has indicated that the United States should pursue its valid alternatives to subpoena enforcement.

[22] The *First Chicago* holding creates a conflict among United States courts of appeals regarding the propriety of enforcing an order to produce information in violation of foreign law. . . . Until [United States] courts modify their practice of blindly accepting asserted United States interests and engage in good faith evaluations of foreign interests, the situation will not improve. . . . . The United States Supreme Court, which has not ruled on the issues raised by nondisclosure laws since *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers,* should take a fresh look at the problems caused by subsequent lower court decisions and resolve the existing conflict among the circuits.

Note, United States v. First National Bank of Chicago: *Limiting American Extraterritorial Authority to Order the Production of Documents in Violation of Foreign Law,* 33 De Paul L. Rev. 183, 204-06 (1983).

[23] *See In re Grand Jury Proceedings* (*Schofield I*), 486 F.2d 85 (3d Cir. 1973); *In re Grand Jury Proceedings* (*Schofield II*), 507 F.2d 963 (3d Cir.), *cert. denied,* 421 U.S. 1015 (1975). For a discussion of the conflict among the Circuits and a critique, see, *e.g.*, Note, *International Law—Grand Jury Proceedings—Comity of Nations Fails to Justify a Showing of Relevance Prior to Enforcement of Grand Jury Subpoena,* Grand Jury Proceedings [, United States] v. Bank of Nova Scotia, 7 Suffolk Transnat'l L.J. 565 (Fall 1983). *See generally In re Grand Jury Proceedings, United States v. Bank of Nova Scotia,* 691 F.2d 1384 (11th Cir. 1982), *cert. denied,* ___ U.S. ___, 103 S. Ct. 3086 (1983).

The United Kingdom and Cayman maintain their position regarding the Single Convention. The view of these amici embraces the express terms of that treaty, which in the circumstances of this case gives any signatory the right to *require* that legal papers be sent to it through the diplomatic channel (and imposes on the United States the absolute obligation to comply where and when a signatory so requires). *See* Single Convention, Articles 35(e) & 36.[24] "[T]he Single Convention and Amending Protocol *require* the member countries to the convention to be bound to observe the constitutional, legal and administrative systems of member nations." *In re Nigro,* 555 F. Supp. 65, 70 (D. Colo. 1982), *aff'd* 705 F.2d 1224 (10th Cir. 1982), *cert. denied,* ____ U.S. ____ 103 S. Ct. 2087 (1983) (emphasis added).[25]

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[24] *Commentary on the Single Convention on Narcotic Drugs, 1961* art. 35(e) at 422-24, U.N. Sales No. E.73.XI.1 (1973).

[25] The United States has heretofore acknowledged the applicability of the Single Convention to a matter such as this. Substituting the word "Cayman" for "Turks and Caicos," the United States has said: "[T]he provisions of the Single Convention would dictate the common recognition of judicial determinations by courts of competent jurisdiction as between the [Cayman] Islands and the United States of America. . . . To conclude otherwise would only serve to invalidate the judicial proceedings of the [Cayman] Islands and thereafter [therefore] violate the true spirit of the Single Convention." Letter of Bob A. Ricks, Chief Counsel, United States Drug Enforcement Administration, to Norman Noordewier, S/A State Department Liaison, Foreign Programs Staff, United States Department of State (Feb. 28, 1983) (the "U.S. [Turks and Caicos] Memorandum"), *transmitted under cover of* Letter of William C. Sergeant, Program Officer, Bureau for International Narcotics Matters, United States Department of State, to Roger French, British Embassy, Washington (Apr. 3, 1983). *See also* Cayman Narcotics Agreement, 1984, note 15 *supra.*

The act of state doctrine embodied in the Single Convention, as heretofore construed uniformly by the United States and the United Kingdom, applies with equal force to judgments of the Grand Court of Cayman, which Islands are (like the Turks and Caicos) a dependent territory of the United Kingdom.

> On February 18, 1983, the [United States] government had requested that the [United States District C]ourt [for the Southern District of Florida] take judicial notice of the foreign government status of the [Turks and Caicos] Islands, its relationship with the United Kingdom, and application of the 1961 Single Convention and the 1972 Protocol. A statement of the Attorney General of the Islands was attached to the request. The record does not disclose whether the request was granted.

Even assuming *arguendo* the existence of the Single Convention does not require any *greater* deference to foreign law than that already recognized in the balancing test set forth in Section 40 of the *Restatement (Second) of the Foreign Relations Law of the United States,*[26] due deference must be given to the Cayman CR(P)L and other Cayman law, the two Cayman Grand Court decisions, and the views and representations of the affected foreign sovereigns, in accordance with the decisions of this Court and other United States courts.[27]

The United Kingdom's extension of the Single Convention to Cayman was a *prima facie* act of state. Pursuant to the Single Convention, the United Kingdom maintains the requirement that signatories to that treaty use diplomatic channels to request information located in the United Kingdom or its dependent territories for purposes of a narcotics prosecution. The United Kingdom's requirement is also a *prima facie* act of

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Milburn v. United States, 734 F.2d 762, 764 (11th Cir. 1984) (vacating summary judgment for defendant United States solely for lack of notice and remanding) (tort and inverse condemnation action against United States for returning, pursuant to Single Convention, forfeited airplane to Turks and Caicos seized by those Islands in narcotics smuggling case) (brackets added). *See* note 31 *infra.*

[26] See Section 420 of the *Restatement (Revised) of the Foreign Relations Law of the United States* (Tent. Draft No. 3, 1982), which reflects and represents current scholarly thinking.

[27] In determining the existence and meaning of treaties, "the Supreme Court has stressed the importance of deferring in such cases to the intentions of the State Departments of the *two* nations." *Arnbjornsdottir-Mendler v. United States,* 721 F.2d 679, 681 (9th Cir. 1983) (citing *Terlinder v. Ames,* 184 U.S. 270 (1902)) (emphasis added). To the same effect, see, *e.g., Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 184 n.10 (1982) ("position of the Government of Japan is entitled to great weight"). "This question ["whether the Evidence Convention supersedes state and federal discovery procedures"] is one of federal law to be determined by the intent of the parties to the treaty, and the starting point for analysis is the language of the treaty itself. *See Sumitomo. . . .*" Brief for the United States as Amicus Curiae at 6 (Sept. 84), *Club Mediterranee, S.A. v. Dorin, appeal docketed,* 52 U.S.L.W. 3210 (U.S. Sept. 16, 1983) (No. 83-461) (brackets added and case citations omitted). "It is well settled that United States courts should refrain, if possible, from ordering a person to perform an act that would violate the laws or clearly articulated policies of a foreign government." *Id.* at 10. "The courts below, however, do not appear to have engaged in the balancing of pertinent interests necessary to a proper comity analysis." *Id.* at 14.

state. The Cayman Governor's adoption and implementation of the procedures under the Cayman/U.S. Agreement was also a *prima facie* act of state. The Cayman Legislature's enactment of the CR(P)L was also a *prima facie* act of state. So were the Grand Court's decisions under the CR(P)L enjoining the Bank from disclosing the Cayman Brady documents (*i.e.*, those kept at the Cayman branch of the Bank) without the further order of that Court.

The controlling decisions of *this* Court preclude the United States courts from inquiring into the validity of the public acts of state of a recognized foreign sovereign power committed within its own territory in the exercise of its governmental authority.[28] A United States court's refusal to acknowledge either the validity or the applicability of the United Kingdom's and Cayman's respective domestic law requirements is a *de jure* inquiry into, and ruling on, the validity of these amici's acts of state. A United States court's refusal to acknowledge the validity of the Cayman Grand Court's longstanding requirement that a showing of materiality be made under the CR(P)L is a *de facto* ruling on the validity of Cayman's acts of state.[29]

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[28] In describing the act of state doctrine in the past we have said that it "precludes the courts of this country from inquiring into the validity of the *public* acts of a recognized foreign sovereign power committed within its own territory," and that it applies to "acts done within their own states, in the exercise of *governmental authority.*"

Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 706 (1976) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964), and *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)) (emphasis in original).

[29] "The application of the act of state doctrine [in the United States courts] to foreign countries' blocking or secrecy laws has been raised only infrequently and so far has met with little success." P. Bschoor & M. Mullin, *Foreign Sovereign Immunity and Act of State*, in *2 Transnational Litigation: Practical Approaches to Conflicts and Accommodations* 586, 624 *passim* (ABA) (J. Fedders, J. Harris, R. Olsen, B. Ristau ed. 1984) (brackets added) (collecting cases). American legal commentators question whether the analysis of the act of state doctrine in such cases can be reconciled with the traditional application of act of state in other areas, *see, e.g. id.*, and suggest that the parameters of the act of state doctrine should at last be clarified by this Court in order to provide guidance for lower courts. *See, e.g.*, Leigh & Sandler, Dunhill: *Toward a Reconsideration of* Sabbatino, 16 Va. J. Int'l L. 685 (1976); Note, *Judicial Balancing of Foreign Policy Considerations,*

Moreover, no exception to the act of state doctrine applied here, whether by virtue of *Sabbatino* or otherwise.[30]

Even if the act of state doctrine "is completely inapplicable in the investigatory or criminal context,"[31] this case is a civil

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Comity and Errors Under the Act of State Doctrine, 35 Stan. L. Rev. 327 (1983). The factors set forth in *Sabbatino* all counsel application of the doctrine and judicial abstention in this case. In the alternative, there was no subject matter jurisdiction in fact to issue or enforce the subpoena with respect to the Cayman Brady documents. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182 (1936); *see Menchaca v. Chrysler Corp.*, 613 F.2d 507, 511 (5th Cir.) (burden of proof on plaintiff to establish jurisdiction in fact), *cert. denied*, 449 U.S. 1093 (1980).

[30] *Contra*, the decision below, 740 F.2d at 832 n.23:

> Even if we were to assume that the act of state doctrine applied, this case would fall within the [Second Circuit's] *Sabbatino* exception. . . . "[W]hen the executive branch of our [United States] government announces that it does not oppose inquiry by American courts into the legality of foreign acts, an exception to the judicial abnegation required by the act of state doctrine has arisen . . ."

(Quoting and following District Court's quotation from *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964)) (brackets added).

This Court reversed the Second Circuit's decision in *Sabbatino* 20 years ago. Moreover, this Court has, in amici's view, repeatedly declined to recognize such an exception on separation of powers grounds, specifically on the basis that United States courts do not and should not need the permission of the executive branch to determine their jurisdiction *vel non* in a given case. *See, e.g., First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773 (1972) (Douglas, J., concurring); *accord id.* (Powell, J., concurring); *id.* at 788-89, 792 (Brennan, J., joined by Stewart, Marshall, & Blackmun, J.J., dissenting).

[31] 740 F.2d at 831. These amici agree that Brady, wherever he may be found, cannot maintain that the United States lacks extraterritorial jurisdiction to prosecute him under the Single Convention. *See* Single Convention, art. 36(2)(a)(iv), *quoted and explained in, e.g., Chua Han Mow v. United States*, 730 F.2d 1308, 1312-13 (9th Cir. 1984), *pet. for reh'g and suggestion for reh'g en banc filed*, (9th Cir. Apr. 26, 1984). It does not follow from this limited grant of extraterritorial jurisdiction under Article 36 that the United States can ignore its duties to the United Kingdom and Cayman under Article 35(e) to use diplomatic channels for the purposes of obtaining the Cayman Brady documents for such prosecution. Neither does it follow from this limited grant that the act of state doctrine embodied in the Single Convention "is completely inapplicable in the investigative or criminal context."

contempt case, *not* a criminal case—a fundamental distinction under the controlling decisions of both this Court *and* the

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On the contrary, the U.S. [Turks and Caicos] Memorandum, note 25 *supra*, involved the United States' recognition of a Turks and Caicos court's judgment of *criminal* forfeiture. *See Regina v. Human & Burt*, No. 138/81 Crim. Div. (Magistrate's Ct., Turks and Caicos Islands 1981) (order of forfeiture of aircraft used for transportation of cannabis entered upon conviction of defendant). It is the United States' recognition of the applicability of the act of state doctrine to that judgment which forms the basis of the United States' legal justification for its conduct and Single Convention defense in the pending *Milburn* case, note 25 *supra*: "[T]he [United States'] action [in returning to the Turks and Caicos the aircraft forfeited in *Human & Burt*] was a valid exercise of police powers in order to prevent a violation of a foreign nation's laws and to honor a foreign court judgment." Brief for [Defendant-Appellee] United States at 15, *Milburn v. United States*, 734 F.2d 762 (11th Cir. 1984) (filed by U.S. Atty., S.D. Fla.) (brackets added) (case citations omitted). "Indeed the government officers were required to release the aircraft to the foreign government since the obligations under the treaty are mandatory." *Id.* at 9 n.9.

> The Turks and Caicos Islands is an adopting party to the [Single Convention] treaty, and the officials of the United States had a duty to cooperate with that government under the treaty. . . . It would be unreasonable to expect other nations to cooperate with the United States if the United States is unwilling to live up to its own treaty obligations. . . . The treaty involved here is self-executing. . . . Even if the treaty was not self-executing, there are very important policy considerations weighing in favor of our cooperation. One such consideration is the treaty itself. Article 14 of the treaty provides for sanctions which may be imposed against any party which fails to perform its duties under the treaty. . . . Furthermore, under the provisions of the treaty, the government officials were obligated to honor the claim of the foreign country. . . .

Id. at 11-12, 14 & nn.13 & 16 (footnotes and citations omitted) (brackets added).

For an earlier and extended treatment of the United States' obligations to the United Kingdom and its dependent territories under the Single Convention (making the above points and anticipating the U.S. [Turks and Caicos] Memorandum), see [United States'] Memorandum of Law in Support of Motion to Dismiss, or in the Alternative, Motion for Summary Judgment at 3, 5-6, 8-9 & n.12 (Dec. 30, 1982), in *Milburn v. United States*, No. 82-6514-CIV-Gonzalez (S.D. Fla. filed Aug. 4, 1982), *motion granted and complaint dismissed with prejudice*, (S.D. Fla. Mar. 22, 1983), *vacated and remanded*, 734 F.2d 762 (11th Cir. 1984) (holding dismissal order was summary judgment without notice) ("expressing no opinion on the merits").

Eleventh Circuit. Moreover, in this case the United States, not the Bank, held the keys to the Bank's prison—a prison not of the Bank's own making.[32] Had the United States used the less intrusive diplomatic channels available, no "prison" would have existed; the Cayman authorities would have permitted the

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The above clearly contradicts any conclusion that the United States "cases clearly establish that a country's obligations to cooperate under the Single Convention are governed by its own domestic law." 740 F.2d at 831. In fact, as *Milburn* and many other United States cases demonstrate, the United States has repeatedly argued the opposite in United States courts, *including* the courts below. *See* note 25 *supra*. Similarly, United States courts uniformly conclude that *foreign governments'* obligations to cooperate *with the United States* under the Single Convention are governed *by* the Single Convention—not those foreign governments' domestic law. *See, e.g., Chua Han Mow, supra*, 730 F.2d at 1313 ("The only effect of the provision [Single Convention, art. 36(2)(a)(iv)] is that Malaysia would have been required to prosecute Chua [a Malaysian citizen] if extradition had not been acceptable to Malaysia. The provision is not applicable in this case because extradition was acceptable to Malaysia.") (brackets added). *See also Nigro, supra*. Ironically, the *only* domestic law requirement expressly protected in Articles 35 and 36 is the absolute right of a signatory to insist that fellow signatories use diplomatic channels to obtain information. Single Convention, art. 35(e).

[32] Paradoxically, a more traditional view of civil contempt was taken by the Eleventh Circuit less than a month later:

> [C]ivil contempt [is] a sanction designed to compel a person to do what the court has ordered him to do. Since contempt is a conditional sanction, the person in civil contempt must be given the opportunity to bring himself into compliance. *Lance v. Plummer*, 353 F.2d 585, 592 (5th Cir. 1965). Thus, inability to comply is a complete defense to a contempt citation. *United States v. Rylander*, 460 U.S. 752, ____, 103 S. Ct. 1548, 1552, 75 L. Ed. 2d 521, 528 (1983); *United States v. Hayes*, 722 F.2d 723, 725 (11th Cir. 1984). A person in civil contempt holds "the keys to his prison." *See generally*, 3 C. Wright, Federal Practice and Procedure § 704 (2d ed. 1982). It is true that the Court in *Newman v. Alabama* noted that good faith would not preclude a contempt citation. 683 F.2d at 1318 n.16. But a person who attempts with reasonable diligence to comply with a court order should not be held in contempt. *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir. 1981).

Newman v. Graddick, 740 F.2d 1513, 1524-25 (11th Cir. Sept. 10, 1984) (brackets added), *petition for reh'g filed*, (11th Cir. Oct. 1, 1984).

Bank to produce the Cayman Brady documents to the United States in a timely and orderly manner.

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IN THE

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OCTOBER TERM, 1984

In re Grand Jury Proceedings
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THE BANK OF NOVA SCOTIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE GOVERNMENT OF CANADA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF THE GOVERNMENT OF CANADA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI *

THE INTEREST OF THE AMICUS CURIAE

A. Statement of the Issues

The petition for certiorari in this case presents two questions for review: one is the proper resolution of a

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* Both Petitioner and Respondent have consented to the appearance of the Government of Canada as an amicus curiae, and the written consents are on file with the Clerk. The Government of Canada previously appeared as an amicus curiae in this matter, supporting the Petitioner before the Court of Appeals for the Eleventh Circuit and on remand before the U.S. District Court for the Southern District of Florida. The decision below is reported at 740 F.2d 817.

dispute involving a nonparty custodian, Petitioner, the Bank of Nova Scotia, caught between conflicting commands of two states in which it transacts business; the other concerns the lawfulness of the imposition and aggregation against that custodian of that portion of the fine imposed for contempt concerning its conduct in a third state.

The first issue involves the U.S. courts' failure to recognize the May 31, 1983 order of the Grand Court of the Cayman Islands, which specifically prohibited the Bank from producing documents located in the Cayman Islands, as legitimately taking precedence over the contrary October 20, 1983 order of the U.S. District Court. The second issue primarily involves whether the Bank substantially and in good faith complied with the subpoena of documents from the Commonwealth of the Bahamas after the Bahamian Attorney General had determined that Bahamian law did not prevent compliance.

This Brief, like the prior submissions on behalf of Canada in this case, is limited to the first question, *i.e.*, the permissibility under international and United States law of an enforcement action whereby foreign nationals in the United States are punished for complying in third countries with the law of those countries properly applied to matters within their territory.

In its second opinion in this case (Pet. App. A), the Court of Appeals devoted most of its efforts to the Bank's conduct in inspecting its files in the Bahamas, and paid little attention to the more basic issues—*i.e.*, how the Bank should behave in the face of directly conflicting commands, and the respect due in the United States to the judgment of a foreign court, in this case the Cayman court. The subsequent diligence or nondiligence of the Bank in the Bahamas is irrelevant to the effect of Cayman law and to the order of the Cayman court. The Government of Canada seeks herein to focus the atten-

tion of this Court on the conflict caused by the directly opposing orders of the U.S. and Cayman courts.

B. The Interest of the Government of Canada

The Government of Canada is submitting this Brief in support of the petition for certiorari because the decision below threatens important and legitimate interests of the Canadian government and Canadian banks engaged in international commerce. The present case carries implications far beyond that of a single event or episode. It is the importance of having these broader implications recognized that has persuaded the Government of Canada of the advisability of placing its views directly before this Court. There are three principal concerns:

—First, it may establish a principle of U.S. law that Canadian and other foreign multinational enterprises owe a higher loyalty to the United States than to their home or host sovereigns for conduct in their home or host territory. Such a principle would undermine Canadian authority to govern Canadian residents and nationals in Canada.

—Second, the governments of the United States and Canada have engaged for more than three decades in efforts to resolve the inevitable conflicts of jurisdiction between two nations which share not only a continent but also strongly intertwined economies. The Government of Canada is anxious to preserve and improve these cooperative efforts, and to see that they are not jeopardized by precedents that could adversely affect Canadian or American companies with multinational operations.

—Third, the Government of Canada is deeply interested in the viability and good order of the international banking system, and in enhanced cooperation among supervisory authorities in the major financial centers. If each nation is free unilaterally to undermine explicit foreign governmental

> regulations directly affecting persons within foreign territories, the uncertainties and costs of doing business internationally for Canadian persons and enterprises will increase, and all major trading nations, including the United States as well as Canada, will suffer.

Each of these concerns will be spelled out more fully if review is granted.

ARGUMENT

I. UNDER PRINCIPLES OF INTERNATIONAL AND UNITED STATES LAW, PERSONS MAY NOT BE ORDERED TO VIOLATE THE LAW OF ANOTHER STATE WITHIN THAT STATE

The principle that a person may not be placed in a position that whatever it does subjects it to sanction is deeply rooted in basic concepts of fairness. It is borne out by a series of cases in the United States, particularly the cartel cases brought shortly after World War II. *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949), 115 F. Supp. 835 (D.N.J. 1953) (United States-Netherlands); *United States v. Imperial Chemical Industries*, 100 F. Supp. 504 (S.D.N.Y. 1951), 105 F. Supp. 215 (S.D.N.Y. 1952) (United States-United Kingdom). The rule is succinctly stated in the *Restatement of the Foreign Relations Law of the United States (Revised)* § 419(1):[1]

> (1) A person may not ordinarily be required by authority of [one state]
>
> (a) to do an act outside [that state] prohibited by the law of the state where the act is to be done . . .; or
>
> (b) to refrain from doing an act outside [one state] required by the law of the state where the act is to be done . . .

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[1] *Restatement of the Foreign Relations Law of the United States (Revised)* § 419(1) (Tent. Draft No. 3, 1982).

Section 419 sets forth two principles: one concerning territorial preference, the other concerning conflict avoidance.[2] Both principles apply here.

A. Conflicting Sovereign Commands Are to be Resolved in Favor of the Territorial State, Here the Cayman Islands

International law, starting from the basic notions of sovereignty and the sovereign equality of states, accords primacy to regulations of states—whether by statute, order of a court, or otherwise—taken within their own territory. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). That general principle applies in this situation as well, where two states issued directly conflicting commands.[3]

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[2] The Court of Appeals questioned the reliance by the Government of Canada on the Restatement, pointing out that that work is only in tentative form at present. (Pet. App. 19a n.17). But while the Court of Appeals disagreed with Petitioner as to the application of the territorial preference to the present facts, see p. 6 *infra*, it seems inconceivable that this Court would reject the essential principle of conflict avoidance as stated in § 419.

[3] *See Restatement (Revised), supra*, § 419 Comment b, "The territorial preference." The Court of Appeals rejected the Restatement (Revised) position concerning the territorial preference as "not reflecting the current law of the United States." (Pet. App. 19a n.17). Whether or not that is the case, and we doubt it, substantial *international* legal authority certainly supports the principle of the territorial state's primacy. *See, e.g.*, Int'l Law Ass'n, *Report of the Fifty-First Conference* 407, 565-92 (1965) (collecting examples of objections by foreign governments to U.S. extraterritorial discovery demands); A.V. Lowe, *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* 79-225 (1983) containing statutes and primary source documents of foreign governments objecting to U.S. extraterritorial claims); 2 J. Atwood & K. Brewster, *Antitrust and American Business Abroad* § 15.10, at 228 (2d ed. 1981).

It is worth noting that the question of preference is usually considered by courts and commentators as pitting the territorial state against a state exercising jurisdiction on the basis of na-

Whether the issue involved here was *doing* an act, (*i.e.*, disclosing the information requested) or *refraining from doing* an act, (*i.e.*, preserving the confidential character of the banking records in question), the U.S. command to the Bank was to be carried out in the Cayman Islands. The statement of the Court of Appeals that "the Cayman Grand Court purported to control conduct in the United States" (Pet. App. 26a) is clearly mistaken. The records and the information sought by the grand jury were located in the Cayman Islands, and the Grand Court sought to control conduct *only* in the Cayman Islands.

An analogous situation might occur, for example, if the government of a Middle Eastern state in which the Bank of Nova Scotia maintains an office issued an order requiring the Bank to disclose information concerning the alleged business relations between a customer of its Miami office and Israel. For the Miami office to supply that information would violate the foreign political boycott provisions of the Export Administration Act of 1979, 50 U.S.C. App. § 2407(a)(1)(D) (1982), and would place the Bank in a situation of irreconcilable commands. It would surely be the position of the United States, including the Department of Commerce and any U.S. court that might hear the issue, that disclosure or nondisclosure of the information was an activity centered in the United States. The United States would surely protest, as would Canada, if the Middle Eastern state imposed sanctions on the Bank of Nova Scotia for obeying U.S. law in the United States.

U.S. law has modified the rule according preference to the territorial state by requiring persons before the court to make good faith efforts to secure release or waiver from statutory prohibitions. *See, e.g, Restate-*

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tionality. In the present case, of course, the basis of jurisdiction of the non-territorial state (the United States) is not nationality, but mere presence of an agency of the Bank not involved with the documents at issue.

ment (Revised), supra, § 420(2). But the Restatement clearly limits contempt sanctions to *parties*, and until this case and *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 3086 (1983) (*"Bank of Nova Scotia I"*), no court in the United States had imposed contempt on nonparty custodians, where the information sought was at all relevant times located outside the United States, and the U.S. attorney made no effort to justify the U.S. government's need for the disclosure (other than asserting the institutional importance of all grand juries), and in particular failed to demonstrate that alternative intergovernmental avenues to obtain the evidence were exhausted.[4]

B. The Sanctions Imposed by the District Court Show an Unprecedented Disregard for the Judgment of a Foreign Court

No prior U.S. case is known in which an American court has ordered any person before it, let alone a nonparty, noninvestigatory target, to act in defiance of the order of a foreign court. Yet that is just what the District Court did in the present case in its order of October 20, 1983, as upheld by the Court of Appeals.

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[4] We note by way of analogy that U.S. courts have been unwilling, absent a balancing test showing an overriding need, to sustain contempt findings against officials of American states who have declined to furnish information to federal grand juries on the basis of state laws. *See, e.g., In re Hampers*, 651 F.2d 19 (1st Cir. 1981); *In re Cruz*, 561 F. Supp. 1042 (D. Conn. 1983); *In re Grand Jury Empanelled Jan. 21, 1981*, 535 F. Supp. 537 (D.N.J. 1982). If the interest of a state of the United States is sufficient to sustain a qualified privilege of confidentiality and to require federal law enforcement officials to show a sufficiently particularized need to overcome that interest, notwithstanding the Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, the interest of a foreign state would seem entitled to at least equal respect.

While the Government of Canada does not believe that even this type of balancing (which was not exercised by the courts below) is necessary or appropriate under international and U.S. law for *international* sovereign conflicts, it is prepared to address the issue if this Court grants certiorari.

The significance of the order of the Cayman court in the present case is threefold. *First*, it distinguishes this case from *Bank of Nova Scotia I*, *supra*, and *United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976), in which no foreign court order was involved. *Second*, it distinguishes this case from other cases in which the plea that disclosure would violate the law of a foreign state was in doubt, either because the law itself was not clear, *see, e.g., United States v. First National City Bank*, 396 F.2d 897, 903-05 (2d Cir. 1968), or because it depended on the interest of the foreign state in the matter at issue and that interest was not clear. *See, e.g., United States v. Vetco*, 691 F.2d 1281, 1289 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981). In the present case, there could be no question at the time of the District Court's order on October 20, 1983, that the Cayman law applied, and that it prohibited the Bank's compliance with the subpoena.

Third, the judgment of the Grand Court of Cayman of May 31, 1983 met all the requirements for recognition and respect by the District Court. *See, e.g., Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972); *Restatement (Revised)*, *supra*, §§ 491-92 (Tent. Draft No. 4, 1983). No justification has been presented by the United States for declining to recognize this judgment. The May 31 judgment of the Cayman court was fully effective and binding on October 20, 1983, but was not even mentioned in the Order of that date issued by the District Court. There was no respect for foreign judgments, and no consideration of comity. The fact that a respected District Court could so disregard fundamental principles of relations among states and courts to the point of not even considering them shows the need for guidelines, and accordingly the need for review by this Court.

C. United States Law, in Conformity with International Law, Imposes Limits on the Extraterritorial Reach of Subpoenas: The Attempt to Use the Presence of the Bank in the United States to Circumvent These Limits Should Not Be Permitted

In the statute authorizing issuance of subpoenas to a person in a foreign country, 28 U.S.C. § 1783 (1982), incorporated by reference in Fed. R. Civ. P. 45(e)(2) and Fed. R. Crim. P. 17(e)(2), Congress provided for several limitations on use of the subpoena power, all in recognition of the relevant concerns of international law. *First*, such subpoenas may be issued only by the court, not by the clerk of the court or a grand jury. *Second*, such subpoenas may be issued only to nationals or residents of the United States. *Third*, such subpoenas may be issued only "if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice." 28 U.S.C. § 1783(a) (1982).[5]

It is evident that the subpoena at issue here failed to meet the standards of section 1783 in several respects. The prosecution avoided initial screening by the court, as well as the territorial limits of the statute and Rules, by acting as if what was involved was a routine subpoena to a local bank. The theory apparently was that

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[5] The Senate Report accompanying the legislation that adopted the current version of Section 1783, Pub. L. 88-619, 78 Stat. 997 (1964), makes clear that

> In determining whether the issuance of a subpena is in the interest of justice, the court may take into account the nature of the proceedings, the nature of the testimony or the evidence sought, the convenience of the witness or the producer of the evidence, the convenience of the parties, and other facts bearing upon the reasonableness of requiring a person abroad to appear as a witness or to produce tangible evidence.

S. Rep. No. 1580, 88th Cong., 2d Sess. 10 (1964), *reprinted in* 1964 U.S. Code Cong. & Ad. News 3782, 3791; *see also* H.R. Rep. No. 1052, 88th Cong., 1st Sess. 10 (1963).

physical power over a single office and a few employees of the Bank in Miami gave the grand jury authority to require production of records from anywhere the Bank had an office—in this case some 1,200 offices in 52 countries on 6 continents. Some 45 foreign banks have representation in Miami; several hundred have representation in New York and other major American financial centers. It seems improbable that the U.S. Congress contemplated threats and sanctions against U.S. offices of foreign banks as a way around the restraints it placed on subpoenas issued under the authority of the United States, and no such intent should be imputed. *See Commodity Futures Trading Commission v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984); *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980).[6]

Further, the device used by the grand jury and sustained by the District and Circuit Courts in this case seems contrary to the approach to exercise of judicial power (if not to the precise holding) taken by this Court in *Shaffer v. Heitner*, 433 U.S. 186 (1977). In *Shaffer*, this Court reversed the lower courts' attempt to exercise jurisdiction over a nonresident person on the basis of presence of intangible assets related to the nonresident by ownership but not linked in any way to the cause of action. Here, the lower courts have exercised jurisdiction over a nonresident (the Cayman office of a Canadian bank) on the mere basis of the presence of an affiliate office of the Bank, not linked in any way to the evidence or investigation in question.[7] *Shaffer* of course concerned

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[6] It will be recalled that in *Blackmer v. United States*, 284 U.S. 421 (1932), sanctions for failure to respond to a summons directed to a U.S. citizen residing in France were sustained, but only by virtue of the link of citizenship.

[7] The fact mentioned by the Court of Appeals that the Bank has offices in several U.S. cities (Pet. App. 19a n.18) takes nothing away from its status as a Canadian enterprise. According to its

only domestic interstate relations; its analysis is even more compelling in an international context.

II. THE SANCTIONS IMPOSED ARE CONTRARY TO THE POLICIES OF THE UNITED STATES (AND OF CANADA) TO MINIMIZE INTERGOVERNMENTAL CONFLICTS AND TO ENCOURAGE TRANSNATIONAL INVESTMENT AND BANKING

The United States, Canada, the United Kingdom and the other Western industrialized democracies participate in a number of international fora as part of an overall effort to reconcile intergovernmental conflicts and to promote international commerce. Two are particularly important here: the Organization for Economic Cooperation and Development ("OECD"),[8] and the Basle Concordat among central banks concerning international banking supervision.[9]

A. The OECD and Intergovernmental Conflict Resolution

On May 18, 1984, the OECD Council, meeting at the Ministerial level, agreed to strengthen bilateral and multi-

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Annual Report for 1983, the Bank had 20,279 shareholders, of whom approximately 96 percent were Canadian. It maintains over 1,200 offices throughout the world, of which 1,022 are located in Canada, 9 in the continental United States, and about 170 in some 50 other countries. If the decision below were to become a general precedent, it appears that any prosecutor (or possibly even a civil plaintiff) in any of the nine U.S. cities where the Bank is represented could obtain records maintained at any of the other 1,200 or so offices of the Bank in Canada and around the world, regardless of the local law applicable to those foreign branches.

[8] Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960, *entered into force* Sept. 30, 1961, 12 U.S.T. 1728, T.I.A.S. No. 4891, 888 U.N.T.S. 179. The twenty-four member countries of the OECD account for the vast majority of the world's trade and investment flows.

[9] The Basle Concordat is formally known as Principles for the Supervision of Banks' Foreign Establishments (1975, revised 1983). The current Concordat is reprinted in 12 Int'l Monetary Fund Survey 201 (1983). *See generally* pp. 13-14 *infra*.

lateral cooperation in intergovernmental conflicts involving multinational enterprises.[10] To this end, the Ministers reviewed the 1976 Declaration and Guidelines on International Investment and Multinational Enterprises, and in particular endorsed a series of recommendations concerning methods to ameliorate conflicting requirements imposed on multinational enterprises by various jurisdictions. The pertinent part of those recommendations states:

> 27. In contemplating new legislation, action under existing legislation or other exercise of jurisdiction which may conflict with the legal requirements or established policies of another Member country and lead to conflicting requirements being imposed on multinational enterprises, the Member countries concerned should:
>
> i) Have regard to relevant principles of international law;
>
> ii) Endeavour to avoid or minimise such conflicts and the problems to which they give rise by following an approach of moderation and restraint, respecting and accommodating the interests of other Member countries;
>
> iii) Take fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries; . . . .
>
> 28. Member countries should endeavour to promote co-operation as an alternative to unilateral action to avoid or minimise conflicting requirements and problems arising therefrom. Member countries should on request consult one another and endeavour to arrive at mutually acceptable solutions to such problems.[11]

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[10] Organization for Economic Cooperation and Development, PRESS/A (84)28, ¶ 36 (May 18, 1984).

[11] Organization for Economic Cooperation and Development, *International Investment and Multinational Enterprises: The 1984 Review of the 1976 Declaration and Decisions* 26 (1984).

The United States participated in this endorsement. The actions of the U.S. Attorney and the decisions of the courts below are inconsistent with the spirit and intent of this United States policy commitment.

It is not for the Government of Canada to say how the United States government should have carried out its obligation to mitigate the conflict. For instance, it might have given such support to the Bank in its application to the Cayman Court as to make that application viable. It might have resorted to the so-called "Gentlemen's Agreement" between the United States and the Cayman Islands (Opinion of the Court of Appeals, Pet. App. 20a-23a). Alternatively, the United States might have sought international judicial assistance through letters rogatory, or it might have resorted to diplomatic channels, directly with the Cayman Islands or with the assistance of the United Kingdom and Canada. Canada recognizes the interest of the lower courts in preserving the investigatory powers of the grand jury (Pet. App. 12a-14a). It does not follow, however, that the obligation of states to avoid conflicts—and especially conflicts that catch third country nonparty nationals in the middle—is removed or discharged because a grand jury is conducting an investigation.

B. International Cooperation in Multinational Banking

In recent years the major banking countries have come to realize that it is now necessary for host and home states to cooperate in allocating supervisory responsibility for transnational banking operations as to issues of solvency, liquidity, foreign exchange and soundness of operations generally. The Basle Concordat has established the framework for such an international supervisory system.[12] Under that agreement, gaps in regulation are to

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[12] The parties to the Concordat are the central banks of Belgium, Canada, the Federal Republic of Germany, France, Italy, Japan, Luxembourg, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States.

be filled by either host or home state, and overlaps are to be worked out between the regulatory authorities of the two states having jurisdiction so as to avoid conflict and uncertainty.

Such international banking cooperation and the commercial stability and fairness it seeks is undermined when one host state, or rather particular law enforcement authorities in one host state among many, resort to ad hoc unilateral coercion. In its decision below, the Court of Appeals said:

> The Bank has voluntarily elected to do business in numerous foreign host countries and has accepted the incidental risk of occasional inconsistent governmental actions. It cannot expect to avail itself of the benefits of doing business here without accepting the concomitant obligations.

(Pet. App. 19a-20a). The Government of Canada submits that inconsistent government orders are not "incidental" or "occasional" problems for multinational banks and business enterprises, but are a significant disincentive to doing business on a global scale.

This case presents a suitable vehicle for this Court to address—none too soon—the problem of adjusting national laws written with quite different problems in mind to the age of global business and global banking.

CONCLUSION

This Court has not had occasion since *Société Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197 (1958), to address the conflicting demands of disclosure and confidentiality across international frontiers. It has never addressed in this context the particular and widespread problem of nonparty intermediaries and custodians of information, such as multinational banks. Moreover, this Court has never addressed the question of balancing of competing state

interests where U.S. extraterritorial jurisdiction is being asserted.

Numerous lower court cases in the United States have considered these issues, with inconsistent and confusing results, certainly as to U.S. law and sometimes also as to international legal requirements. The present case provides an opportunity for this Court to fill a pressing need for guidance—to lower courts, to U.S. prosecutors, and to multinational banks doing business in the United States.

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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No. 84-329

In the Supreme Court of the United States

OCTOBER TERM, 1984

BANK OF NOVA SCOTIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the lower courts' enforcement of a grand jury subpoena issued to petitioner was proper despite petitioner's claim that compliance with the subpoena would violate foreign law and a foreign judicial decision.

2. Whether a fine of $25,000 per day imposed as a contempt sanction to coerce petitioner's compliance with the grand jury subpoena was civil in nature.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 740 F.2d 817. A prior opinion of the court of appeals (Pet. App. 1c-3c) is reported at 722 F.2d 657. Orders of the district court (Pet. App. 1b-17b, 1d-3d, 1e-2e, 1f-2f, and 1g-2g) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1984, and the petition for a writ of certiorari was filed on August 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges orders of the United States District Court for the Southern District of Florida holding it in civil contempt for failing to comply with prior orders of the

court enforcing a federal grand jury subpoena and imposing a fine of $1,825,000.

Petitioner is a Canadian banking corporation headquartered in Toronto (Pet. App. 2a). On March 4, 1983, its office in Miami, Florida, was served with a grand jury subpoena issued by the United States District Court for the Southern District of Florida (*ibid.*). The subpoena required petitioner to produce financial documents pertaining to two individuals and three companies from its branches in the Bahamas, the Cayman Islands, and Antigua (*ibid.*).[1] In a letter dated March 23, 1983, to the Assistant United States Attorney handling the grand jury proceedings, counsel for petitioner requested, inter alia, " 'a sworn statement regarding the nature of the evidence sought by the subpoena and its relation to the investigation' " (*id.* at 3b). On March 29, 1983, one of petitioner's agents appeared before the grand jury and declined to produce the subpoenaed documents (*ibid.*).

On April 4, 1983, petitioner filed a motion to quash the subpoena, contending that compliance with the subpoena would violate the bank secrecy laws of the Bahamas and the Cayman Islands (Pet. App. 2a-3a). On April 27, 1983, the district court denied petitioner's motion and ordered petitioner to comply with the subpoena by May 31, 1983 (*id.* at 1g-2g). The district court also directed the government "to provide any reasonable assistance" to the petitioner, "especially in dealing with the foreign governments," but expressly held that the government was not required to forward letters rogatory (*id.* at 2g).

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[1]Petitioner determined that there were no documents responsive to the subpoena at its Antigua branch, and thus that aspect of the subpoena is not at issue. Pet. App. 2a n.1.

During May 1983, petitioner did not attempt to comply with the district court's order by searching for subpoenaed documents (Pet. App. 3a). Instead, petitioner spent its time making numerous requests of the government to send letters rogatory and to show the materiality and necessity of the subpoenaed documents to the grand jury investigation (*ibid.*). The government repeatedly responded that it was willing to furnish any requested assistance short of showing materiality and necessity or sending letters rogatory (*ibid.*).

Petitioner's only effort to comply with the court's order during May consisted of the filing on May 27, 1983, of a petition with the Grand Court of the Cayman Islands, in which it sought permission to disclose documents called for by the subpoena (Pet. App. 3a, 4b). The Cayman court denied the petition on May 31, 1983, and ordered petitioner not to produce the subpoenaed documents (*id.* at 5b). Petitioner never appealed this order to the Court of Appeals in Jamaica (*id.* at 4a, 5b).

On June 1, 1983, the district court conducted a hearing at which petitioner again requested the court to direct the government to make a showing of the materiality and necessity of the subpoenaed documents to the grand jury investigation and to issue an order containing findings of materiality and necessity (Pet. App. 5b). At the same time, however, petitioner's counsel expressed uncertainty as to whether the requested showing and findings would satisfy the Cayman court (*id.* at 5b-6b). The government, "declining to lay open its entire grand jury investigation for the purpose of proceeding in the foreign court," again expressed willingness to provide any assistance short of making the showing requested by petitioner or sending letters rogatory (*id.* at 6b).

On October 10, 1983, the district court issued an order in which it concluded that "the government has done all that it is required to do by law and by this Court's order of April

27, 1983 in connection with the enforcement of its subpoena" and that "[t]here can be no doubt that the Bank must comply with the subpoena" (Pet. App. 2f). Thus, the court directed petitioner to comply with the subpoena by October 17, 1983, or face a contempt hearing on October 21, 1983 (*ibid.*). Well before this time, petitioner knew, as a result of litigation relating to a different grand jury subpoena, that the Eleventh Circuit had rejected its claims that it was entitled, by virtue of the conflict between the enforcement of the subpoena and the requirements of foreign bank secrecy laws, to a showing of materiality or the issuance of letters rogatory before being compelled to produce subpoenaed records; petitioner also knew that this Court had declined review of these issues. *In re Grand Jury Proceedings (Bank of Nova Scotia I)*, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983).

Petitioner's only effort to locate any documents either in the Bahamas or the Caymans between June 1, 1983, and the scheduled contempt hearing was an October 14, 1983, search of petitioner's office in Nassau, which produced no documents (Pet. App. 4a). Petitioner produced only one document during the seven months following the issuance of the subpoena (*ibid.*).

The district court held a contempt hearing on October 20, 1983 (Pet. App. 1e). In an order issued that day, the court determined that, "[a]s of October 20, 1983, there is clear and convincing evidence that the Bank has not turned over the subpoenaed materials and thus, the Court finds the Bank in contempt of the order of October 10, 1983" (*ibid.*). The court also made a supplemental finding, dated October 24, 1983, that petitioner had not exercised good faith in its efforts to comply with the subpoena (*id.* at 2d). The court imposed a fine of $25,000 per day, to take effect on October 26, 1983, and to remain in effect until the sooner of petitioner's purging itself of civil contempt by complying with

the October 10 order or the expiration of the grand jury (*id.* at 2e). Petitioner appealed from the order of contempt, and the court of appeals stayed the accrual of the fine from October 25, 1983, until November 14, 1983 (*id.* at 4a).

On November 11, 1983, the Attorney General of the Bahamas issued an order allowing petitioner to produce those subpoenaed documents that might be located in the Bahamas (Pet. App. 4a). The Attorney General concluded that the Bahamian bank privacy statute did not prohibit disclosure because petitioner's Bahamian branches did not have an account relationship with the subjects of the subpoena (*ibid.*). Thus, on November 14, 1983, just before the court of appeals lifted the stay of the fine, petitioner produced several documents from its Bahamian branches and asserted that there were no other documents in the Bahamas (*id.* at 4a-5a). The Assistant United States Attorney insisted, however, that other Bahamian documents were still missing (*id.* at 5a). Although petitioner disagreed, it subsequently produced numerous additional documents from its Bahamian branches (*id.* at 5a-9a).

On November 11, 1983, the Grand Court of the Cayman Islands reconsidered petitioner's application for permission to disclose the subpoenaed documents but again refused to grant such authority (Pet. App. 5a). However, on November 17, 1983, pursuant to Section 3(2)(b)(iv) of the Confidential Relationship (Preservation) Law of 1976 (as amended in 1979) (the Cayman bank secrecy statute), the Governor of the Cayman Islands authorized the disclosure of the subpoenaed documents (Pet. App. 5a). On that same day, petitioner produced all of the documents called for by the subpoena from its Cayman branch (*ibid.*). At that time, the government again informed petitioner that a substantial number of documents from the Bahamian branches still had not been produced (*ibid.*). Petitioner did not complete the production of Bahamian documents until January 25, 1984 (*id.* at 6a-9a).

The court of appeals heard oral argument on petitioner's appeal from the contempt order on December 12, 1983 (Pet. App. 8a). Thereafter, the court remanded the case to the district court for further proceedings but retained jurisdiction over the case (*id.* at 1c-3c). One reason for the remand was to permit the district court to consider the significance of informal procedures developed through an exchange of letters between the governments of the United States and the Cayman Islands, which were alleged to have afforded a means by which the government could have obtained the subpoenaed documents (*id.* at 8a n.7).

At a hearing on February 14, 1984, the district court received evidence concerning the "letter agreements" between the United States and the Cayman Islands, known as the "Gentlemen's Agreement" (Pet. App. 9b-12b). The district court determined that the Gentlemen's Agreement was not binding on the United States and that, even if it were, it did not require the government to resort to the procedures under the agreement in this case (*id.* at 15b). Thus, on February 28, 1984, the district court issued an order in which it held that enforcement of the subpoena in this case was proper and directed entry of judgment against petitioner in the amount of $1,825,000 — a fine of $25,000 per day from the date that the court of appeals lifted the stay of the fine through the date on which petitioner completed production of all documents called for by the subpoena (Pet. App. 1b-17b).

Petitioner then appealed the imposition of the fine (Pet. 9). The court of appeals consolidated that appeal with petitioner's pending appeal from the contempt order and affirmed both of the district court's orders (Pet. App. 1a-28a). The court of appeals agreed with the district court's finding that petitioner had failed to exercise good faith in its efforts to comply with the subpoena, adding that the "flurry of activity undertaken by the Bank to discover documents

after the trial court entered its order of contempt cannot save the Bank from the consequences of its previous extensive pattern of delay" (*id.* at 15a). The court of appeals rejected petitioner's contention that the government was required to demonstrate the relevance of the documents sought (*id.* at 13a) and held that the district court had properly analyzed this case under the balancing test of the Restatement (Second) of Foreign Relations Law of the United States (1965) [hereinafter cited as Restatement] (Pet. App. 16a-20a). The court of appeals also held that "[t]he gentlemen's agreement procedure is a far cry from constituting a substantially equivalent alternative to a grand jury subpoena" (*id.* at 23a). The court emphasized that the Gentlemen's Agreement was not even applicable to cases such as this one, in which the United States is concurrently investigating tax and narcotics offenses (*id.* at 22a-23a). The court of appeals further noted that the procedures under the agreement had not, in any event, resulted in the expeditious production of bank records (*id.* at 23a n.21). The court summed up its conclusions as follows (*id.* at 27a-28a (citations omitted)):

> The district judge in this case was extremely patient. He gave the Bank ample chances to comply with the subpoena. But the Bank was just sloppy in its search. The remedy for violation of the district court's order is civil contempt. The imposition of a coercive fine is not improper * * * and will be reversed only for an abuse of discretion. * * * The order of contempt and the fine in this case did not constitute an abuse of the district court's discretion.

ARGUMENT

1. Petitioner urges this Court to address the question whether "a neutral non-party witness [may] be held in civil contempt for abiding by foreign criminal laws and judicial decisions barring the production of documents located abroad when an effective alternative means of securing the

same documents on a government-to-government basis exists" (Pet. i). As it did in *Bank of Nova Scotia* v. *United States*, 462 U.S. 1119, in which this Court denied a petition for a writ of certiorari on June 13, 1983, petitioner contends (Pet. 9) that the decision below conflicts with principles enunciated by this Court and other courts of appeals. Petitioner also contends (Pet. 15-16) that the decision of the court below solicits "international lawlessness" and thus represents a departure from the accepted and usual course of judicial proceedings requiring this Court's intervention.

Contrary to petitioner's argument, the decision below is not in conflict with any decision of this Court, and the courts of appeals are in basic agreement on the appropriate analytic framework to employ in cases of this sort. Moreover, the record in this case does not support petititoner's contentions and does not raise the question petitioner seeks to have reviewed. Accordingly, review by this Court is not warranted.

a. Two principal premises underlying the question posed by petitioner are contrary to the record in this case. First, petitioner was not held in contempt and fined "for abiding by foreign criminal laws and judicial decisions" (Pet. i). Petitioner bases its entire argument on the bank secrecy law of the Cayman Islands, conveniently ignoring the fact that virtually the entire fine in this case was attributable to petitioner's failure to produce documents located in the Bahamas (Pet. App. 16a n.14).[2] But the bank secrecy law of the Bahamas did not bar petitioner's production of subpoenaed records located in that country (*id.* at 4a), and petitioner knew that fact three days before the contempt fine

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[2]Of the total fine, only $100,000 is attributable to days on which petitioner was found to be in contempt for its failure to produce documents located in both countries. Thereafter, the fine continued mounting solely because of petitioner's failure to conduct a diligent search of its Bahamian branches (Pet. App. 14a-15a).

began to accrue (see page 5, *supra*). Thus, a determination that the fine was proper does not require consideration of the impact of the law of the Cayman Islands on petitioner's ability to comply with the subpoena.[3]

Second, this is not a case in which "an effective alternative means of securing the same documents on a government-to-government basis exists" (Pet. i). As both the district court and the court of appeals determined (Pet. App. 22a-23a & n.21, 15b), the "Gentlemen's Agreement" between the United States and the Cayman Islands did not bind the United States, had proven to be ineffective as a means of obtaining bank documents, and was not even available in this case because the grand jury investigation concerned tax offenses as well as narcotics offenses. Thus, the factual predicate for petitioner's argument is totally lacking.[4]

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[3]For the same reason, the briefs of amici curiae filed in support of the petition address irrelevant issues by focusing solely on the asserted conflict between the laws of the United States and the Cayman bank secrecy statute.

[4]The question posed by petitioner also assumes that petitioner is a "neutral" non-party. But it is hardly clear that a bank in petitioner's position should be viewed as a completely neutral entity. This Court has recognized that banks are not "conscripted neutrals" in transactions involving negotiable instruments and that they derive significant benefits from such transactions. *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 48-49 (1974). It goes without saying that other types of transactions with their customers are beneficial to banks as well. Bank secrecy laws of tax havens such as the Cayman Islands undoubtedly attract business for offshore banks. Indeed, as the court of appeals stated (Pet. App. 17a), "[t]he Cayman Islands * * * sees preservation of bank secrecy as vital to the expansion of the Island's principal industry—banking and off-shore finance." As a beneficiary of the expansion of that industry, a bank doing business in the Caymans would have an obvious commercial interest in resisting compliance with a grand jury subpoena and advancing the notion that the bank secrecy laws of that country are an absolute bar to compliance with such a subpoena.

b. Petitioner contends (Pet. 11-15) that the decision of the court of appeals conflicts with this Court's decision in *Societe Internationale Pour Participations Industrielles* v. *Rogers*, 357 U.S. 197 (1958), and with the decisions of the Second and Seventh Circuits in *In re Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962); *Ings* v. *Ferguson*, 282 F.2d 149 (2d Cir. 1960); and *United States* v. *First National Bank*, 699 F.2d 341 (7th Cir. 1983). Petitioner's contention lacks merit. The decision below is not in conflict with *Societe Internationale* or *First National Bank*, and *Chase Manhattan Bank* and *Ings* do not represent the current state of the law in the Second Circuit.

In *Societe Internationale*, a Swiss holding company was seeking to recover assets that had been seized by the Alien Property Custodian under the Trading with the Enemy Act. This Court held that the district court had properly ordered production of Swiss records pursuant to the government's discovery request, despite the plaintiff/Swiss-holding-company's claim that Swiss law limited its ability to satisfy the production order because those producing the records would have been exposed to possible criminal sanctions under Swiss law (357 U.S. at 204-206). Petitioner relies (Pet. 11-12) on the Court's further holding that dismissal of the holding company's complaint was not an appropriate sanction for failure to comply with the discovery request in light of the fact that the holding company had unquestionably made good faith efforts to comply with the production order and because the holding company had certain constitutionally protected rights to maintain the suit (357 U.S. at 208-213). But the Court made it clear that the district court had discretion to impose lesser sanctions (357 U.S. at 213).[5]

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[5]For example, the Court recognized that in the absence of complete disclosure, the district court might be justified in drawing inferences adverse to the holding company as to particular events (357 U.S. at 213).

Accordingly, as recognized in *United States* v. *Vetco, Inc.*, 644 F.2d 1324, 1329 (9th Cir.), cert. denied, 454 U.S. 1098 (1981), *Societe Internationale* "did not erect an absolute bar to summons enforcement and contempt sanctions whenever compliance is prohibited by foreign laws."

In the instant case, unlike *Societe Internationale,* there has been no alleged taking of petitioner's property. Nor, in light of the consent to disclosure ultimately received by petitioner from the Caymans, has petitioner demonstrated that it faced a genuine risk that compliance with the subpoena would subject it to criminal sanctions.[6] Moreover, the district court expressly found (Pet. App. 13b, 2d), and the court of appeals agreed (*id.* at 14a), that petitioner did not make a good faith effort to comply with the subpoena. Nearly all of petitioner's efforts were devoted to trying "to obtain from the goverment what it was clearly not entitled to receive; a showing of materiality and necessity and the issuance of letters rogatory" (*ibid.*).[7] Although petitioner sought the permission of the Grand Court of the Cayman Islands to comply with the subpoena, it did not appeal the Cayman court's denial of its petition — a litigation decision that stands in marked contrast to the vigor with which it has pressed its arguments in the courts of this country.[8] Moreover, petitioner apparently did not attempt to obtain

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[6]Furthermore, given the importance attached by the Cayman Islands to its banking industry (see note 4, *supra*), it is by no means clear that that country's government would consider it appropriate to prosecute a bank for disclosing records in a case such as this one.

[7]Petitioner notes (Pet. 15 n.14) that there is a conflict among the circuits on the question whether the government should be required to demonstrate the relevancy and materiality of information sought by a grand jury subpoena. Petitioner does not, however, seek resolution of this asserted conflict.

[8]Petitioner argues (Pet. 13) that an appeal would have been pointless because it did not have information as to materiality necessary under the Cayman statute and had no basis for challenging the legal standard

authorization to disclose from the Governor of the Cayman Islands until it was faced with the $25,000 per day fine.[9] Thus, petitioner's position is significantly different from that of the plaintiff in *Societe Internationale*, and the decision of the court of appeals is not in conflict with *Societe Internationale*.[10]

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for releasing bank records. But petitioner points to no authority suggesting that it would have been fruitless to attempt to persuade the court of appeals in Jamaica to adopt a balancing test and defer to the superior interests of the United States in this case.

[9]In light of the importance attached by the Cayman Islands to its banking industry, petitioner's situation in this case was analogous to that of a foreign company "in a most advantageous position to plead with its own sovereign for relaxation of penal laws or for adoption of plans which will at the least achieve a significant measure of compliance with the production order." *Societe Internationale*, 357 U.S. at 205.

[10]Nor is the decision below in conflict with any other decision of this Court. Petitioner cites (Pet. 12) *United States* v. *Ryan*, 402 U.S. 530, 534 (1971), for the proposition that sanctions may not be imposed on a witness who has made a good faith effort to comply with a subpoena but is unable to do so for fear of criminal prosecution by a foreign government. *Ryan* does not state that proposition. In that case, the respondent had moved to quash a subpoena duces tecum requiring the production of records located in Kenya on the ground that Kenyan law forbade the removal of the records. The district court denied the motion and ordered the respondent to seek from the Kenyan government permission to remove the documents from Kenya and, in the event that permission was denied, to grant United States agents access to the documents in Kenya. This Court held that the district court's order was not an appealable temporary injunction. In reaching that conclusion, the Court pointed out that a valid subpoena requires a good faith effort to comply, noted that respondent had asserted that compliance with the subpoena would violate Kenyan law, and read the district court's order as doing nothing more than informing "respondent before the event of what efforts the District Court would consider sufficient attempts to comply with the subpoena." Significantly, this Court expressed no opinion whether the district court was required to accept as a sufficient attempt unsuccessful efforts to obtain permission to remove the documents from Kenya.

Although petitioner does not expressly seek review of the issue, it also contends (Pet. 14 n.13) that the court of appeals "misapprehended the

Nor is the decision below in conflict with *United States* v. *First National Bank, supra.* In that case, arising out of an IRS summons enforcement proceeding seeking information pertaining to the IRS's collection efforts, the court expressly recognized that a foreign bank secrecy law did not automatically bar a domestic court from compelling production of bank records (699 F.2d at 345). The court held, however, that under the balancing test of Section 40 of the Restatement, the summons in that case ought not to be enforced (699 F.2d at 345). The court distinguished, on a number of factual grounds, the Eleventh Circuit's decision in *In re Grand Jury Proceedings (Bank of Nova Scotia I),* 691 F.2d 1384 (1982), cert. denied, 462 U.S. 1119 (1983), on which the courts below relied in this case. The Seventh Circuit pointed to, inter alia, the following distinctions: the court of appeals in *Bank of Nova Scotia I* had the benefit of findings of fact by the district court, including a finding that the Bank had not made a good faith effort to comply with the subpoena; the information in *Bank of Nova Scotia I* was

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teaching of this Court in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964)." However, the act of state doctrine considered in *Sabbatino* is plainly inapplicable here because the courts below did not sit in judgment on any acts of the government of the Cayman Islands done within its own territory. See *Sabbatino,* 376 U.S. at 416. Rather, the courts below determined that petitioner did not make a good faith effort to obtain the consent of a foreign government. Furthermore, whatever the merits of petitioner's legal arguments as to the separation of powers and act of state doctrines, the government did not in this case "seek[] to use judicial power as a tool to achieve a political objective, such as the alteration or subversion of domestic law in friendly foreign countries" (Pet. 14 n.13). The government's objective here was simply to obtain evidence needed for the grand jury investigation. Any possible effect of enforcement of the subpoena at issue on a foreign government's policy decisions was purely incidental. As this Court pointed out in *Sabbatino,* 376 U.S. at 423, "it cannot of course be thought that 'every case or controversy which touches foreign relations lies beyond judicial cognizance.' *Baker* v. *Carr,* 369 U.S. 186, 211."

sought by a grand jury rather than by the civil tax collector; Bahamian law permitted disclosure with the customer's consent, while the Greek law at issue in *First National Bank* did not; and the power of a Bahamian court to permit disclosure did not appear to be as strictly limited as that of a Greek court (699 F.2d at 346-347). Although the government does not agree that all of these factual distinctions advanced by the Seventh Circuit justify the result it reached,[11] *First National Bank* is similarly distinguishable from the instant case. Thus, there is no legal conflict requiring this Court's resolution.

Petitioner's assertion that there is a conflict between the Eleventh Circuit and the Second Circuit is erroneous. The Second Circuit has receded from its position in *In re Chase Manhattan Bank, supra,* and *Ings* v. *Ferguson, supra,* that principles of international comity preclude enforcement of a subpoena that might require the subpoenaed party to violate foreign law. See *United States* v. *First National City Bank,* 396 F.2d 897, 901-905 (2d Cir. 1968). Like the Seventh Circuit in *United States* v. *First National Bank, supra,* and the Eleventh Circuit in the instant case, the Second Circuit employed the balancing test of Section 40 of the Restatement in its analysis in *First National City Bank* (396 F.2d at 902).

The Restatement's test also has been adopted by the Fifth, Ninth, and Tenth Circuits, and no circuit employs a contrary test. See *In re Grand Jury Proceedings (Field),* 532

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[11]For example, there is no meaningful distinction between the national interest in grand jury investigations and IRS investigations. As this Court recognized in *United States* v. *Powell,* 379 U.S. 48, 57 (1964), the investigative function of the IRS is essentially the same as that of the grand jury. And, of course, the collection of taxes is essential to the financial integrity of this country. *In re Grand Jury Proceedings (Field),* 532 F.2d 404, 408 (5th Cir.), cert. denied, 429 U.S. 940 (1976).

F.2d 404, 408 (5th Cir.), cert. denied, 429 U.S. 940 (1976); *United States* v. *Vetco, Inc.*, 644 F.2d at 1330; *In re Westinghouse Electric Corp. Uranium Litigation*, 563 F.2d 992, 997 (10th Cir. 1977). Accordingly, there is no merit to petitioner's suggestion (Pet. 13) that this Court should review the appropriateness of looking to the Restatement's balancing test for the resolution of cases such as this one.

2. Petitioner also contends (Pet. 16-18) that the assessment of the fine in this case was punitive and that the fine was imposed without petitioner's being accorded rights to which it would have been entitled in a criminal contempt proceeding. But the record clearly establishes that the fine was properly imposed to coerce petitioner to comply with the grand jury subpoena.

The district court set out the objective of its October 20 contempt order in no uncertain terms (Pet. App. 2e): "The crux of what this Court seeks in this order is the submission of the subpoenaed materials to the grand jury and not the punishment of the Bank." The order provided that petitioner could purge itself of civil contempt by "complying with this Court's order of October 10, 1983" (*ibid.*). The October 10 order required petitioner "to comply with subpoena duces tecum 83-1 served on the Bank on March 4, 1983 no later than October 17, 1983" (*id.* at 2f). Thus, petitioner had a full opportunity to purge itself of contempt and avoid the fine by simply producing the subpoenaed records, and the contempt order and the fine imposed in this case therefore were unquestionably civil in nature. See *Shillitani* v. *United States*, 384 U.S. 364, 368-370 (1966).[12]

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[12]If immediate compliance with the subpoena had been impossible despite the taking in good faith of all reasonable steps to comply, petitioner could have sought relief from the district court. It did not seek such relief while the fine was running. Moreover, as the court of appeals determined (Pet. App. 14a-15a), the record establishes that petitioner's delay in the production of documents pursuant to the subpoena was far

Petitioner nevertheless contends that the fine was punitive because it was assessed for a period of time after petitioner had "complied" with the contempt order (Pet. 17-18). Petitioner reads that order as merely requiring it to end its assertion of foreign law as a bar to compliance with the subpoena. Thus, petitioner argues that it "complied" with the order once it stopped asserting that foreign law precluded the production of subpoenaed documents and it produced the Cayman documents. Petitioner's reading of the contempt order is untenable. Under the plain terms of that order and the October 10 enforcement order, nothing less than production of all of the subpoenaed documents (the Cayman documents *and* the Bahamian documents) would have sufficed to purge petitioner of contempt.

Petitioner also argues (Pet. 18) that the purpose of coercing it to produce documents was satisfied by December 5, 1983, when it had produced all documents from its Bahamian branches except copies of four vouchers pertaining to certificates of deposit that had been redeemed in April 1979; these vouchers were turned over to the government on January 25, 1984 (Pet. App. 9a). Petitioner asserts (Pet. 18) that by December 5, neither the government, petitioner, nor the district court had any reason to believe that any of petitioner's evidence had not been produced.

The continuing need for a coercive fine after December 5 is an entirely fact-bound issue, and petitioner has not advanced any sound reason why this Court should review

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from excusable. Petitioner did not perform a diligent search upon receipt of the district court's enforcement order. And until the fine started to accrue, petitioner ignored numerous warnings from the government that its production of Bahamian documents was incomplete, and it failed to search for records in obvious places. In short, the coercive effect of the fine was unquestionably necessary to obtain petitioner's compliance with the subpoena and the court's enforcement order.

the factual determinations of the two courts below. See *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982). In any event, in claiming that a fine was unnecessary, petitioner ignores the record. At the December 12, 1983, oral argument before the court of appeals, the government disagreed with petitioner's assertion that it had fully complied with the subpoena (Pet. App. 8a n.7). Moreover, petitioner had reason to know that its production was incomplete. Each of the vouchers was one of the copies included in a four-part form whose parts were separated and independently routed through the Bank (*id.* at 9a n.8). Petitioner's personnel should have been familiar with the Bank's own procedures and forms. Thus, it should have been obvious to Bank personnel that submissions before January 25, 1984, lacked these vouchers. While petitioner attempts to minimize the significance of the vouchers (Pet. 18), each is the only document of a four-part form on which a "paid" stamp appears (Supp. C.A. Br. for the United States 30). Thus, these documents were necessary to present a complete series of transactions regarding the certificates of deposit to which they pertained. At any rate, whatever the importance of these documents, petitioner was under an obligation to produce them, and its failure to exercise due diligence to find them manifested a continuing failure to take the district court's enforcement order seriously.

Further evidencing petitioner's continuing failure to take the district court's enforcement order seriously even after December 5, 1983, was petitioner's failure to send a representative to appear before the grand jury. On December 9, the Assistant United States Attorney informed petitioner that a Bank employee was needed to appear before the grand jury on December 20, 1983, to authenticate documents that had been produced (Pet. App. 8a). Petitioner waited until December 19 to notify the employee who was

to appear (*ibid.*). Because of this delay, the witness's appearance before the grand jury had to be rescheduled for January 24, 1984 (*ibid.*).

It is clear from petitioner's conduct throughout this proceeding that, absent a coercive fine, there was no assurance that petitioner would fully comply with the subpoena. Thus, the fine in this case was not punitive, and its imposition does not raise any issue requiring review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 84-329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE GRAND JURY PROCEEDINGS
THE BANK OF NOVA SCOTIA.

THE BANK OF NOVA SCOTIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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The petitioner has identified two important questions presented for review by this Court. First, should the judicial power of the United States be used to coerce the petitioner to violate foreign criminal laws and the explicit injunction of a foreign court? Second, in the circumstances of this case, is a "civil" contempt fine of $1,825,000 punitive?[1] The *amici*—the Governments of Canada, the United Kingdom and the Cay-

[1] If the order of contempt was issued in contravention of law, as the petitioner and the *amici* maintain, then the assessment of the fine was necessarily improper. If the underlying contempt order is sustained, review is nevertheless necessary, as the magnitude and duration of the fine in the present circumstances remains an egregious departure from the accepted and usual course of judicial proceedings.

man Islands, and the Canadian Bankers' Association—who participated in this case before both the district court and the Eleventh Circuit, have advanced "special and important reasons" why certiorari should be granted.

In contrast, the respondent's brief in opposition discloses no "matter or ground why the cause should not be reviewed by this Court." *See* Sup. Ct. R. 22.1. The respondent does not contest the importance of the questions raised. It argues that the questions should be ignored as "fact-bound," or, if the respondent's reconstruction of the facts is substituted for the record, that the questions can be evaded. However, the respondent's argument proceeds on the basis of a contorted presentation of the record and baseless factual inferences. Moreover, the respondent fails to reply to a variety of reasons for granting review that are advanced by the petitioner and the *amici*.[2]

I. THE ORDER OF CONTEMPT SHOULD NOT HAVE ISSUED

The Bank has presented for review the question of whether a neutral non-party witness may properly be held in civil contempt for obeying applicable foreign criminal laws and foreign court orders which bar the production of documents subpoenaed from abroad.[3] The respondent does not challenge the

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2 The current practice of international law in the United States requires foreign governments that find it necessary to comment on U.S. litigation to participate as *amici*. *See Brief of the United Kingdom of Great Britain and Northern Ireland and the Cayman Islands as Amici Curiae* at 9, n. 19 and accompanying text.

3 The respondent slurs the Bank's status as a neutral party in this matter. *Brief for the United States in Opposition* ("Res. br.") at 9, n. 4. The Bank has always sought to assist the government in resolving conflicts created by cross-border subpoenas and to expedite the grand jury process in a lawful manner. *See Brief Amicus Curiae of the Bank of Nova Scotia, Ghidoni v. United States*, 732 F.2d 814 (11th Cir.), *cert. denied*, 53 U.S.L.W. 3324 (U.S. Oct. 29, 1984) (No. 84-270) (*amicus* briefs filed by the Bank supporting the United States in both the Eleventh Circuit and this Court).

importance of that recurrent question. Instead, the respondent suggests, on the basis of a casual and unsustainable interpretation of a relatively uncomplicated factual record, that the question does not exist in this case. The respondent's conclusion is the illogical product of flawed reasoning.

On October 20, 1983, the district court issued a contempt order, and imposed a daily fine of $25,000, to commence on October 26. Appendix E.[4] The fine was stayed by the Eleventh Circuit until November 14, 1983. Appendix A at 4a. Months later, by its order of February 28, 1984, the district court assessed a fine of $1,825,000 against the Bank, covering the period of November 14, 1983 through January 25, 1984. Appendix B at 16b.

The respondent's illogical argument that foreign law issues are not implicated in this case improperly relies on events occurring *after* the contempt order was issued. But the validity of the October 20 contempt order must be reviewed on the basis of the facts and circumstances that existed when the order was issued, and not those of months later. *See ITT Community Development Corporation v. Barton*, 569 F.2d 1351, 1352 (5th Cir. 1978). It is uncontested that when the order was issued, the Bank was barred by provisions of both Bahamian and Cayman criminal law, as well as the order of the Grand Court of the Cayman Islands, from releasing the subpoenaed documents. Appendix N. Those prohibitions were not lifted until several weeks later: on November 14, with respect to Bahamian law, and on November 17, after the fine had begun to accrue, with respect to Cayman law. The sufficiency of the Bank's search for documents in the Bahamas was not an issue in the district court prior to the issuance of the contempt order, or even prior to the November 14 effective date of the fine. The sole basis for the contempt order was the Bank's assertion of foreign law as a sufficient impediment to compliance with the subpoena. That issue is therefore before this Court, in this case. The respondent's contention to the contrary is specious.

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4 Citations in this form are to the Appendices to the Petition for a Writ of Certiorari.

Equally specious is the respondent's attempt to render Cayman law irrelevant. As the bar of Bahamian law was lifted before accrual of the fine, and documents from the Bahamas were produced, the issue of the conflict between U.S. and Bahamian law became moot. But the conflict between U.S. and Cayman law remained a live controversy, as the Bank was unable to produce Cayman documents until four days after the fine began to accrue. The Eleventh Circuit clearly recognized the existence of that controversy. *See* Appendix A at 16a-20a.

The respondent disparages the applicability to this case of the Court's decision in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958) ("*Rogers*"). In *Rogers*, this Court recognized that the "fear of criminal prosecution constitutes a weighty excuse for non-production" of documents from abroad. 357 U.S. at 211. The respondent hints that such "fear" cannot be an excuse in this case because the Bank ultimately escaped prosecution. *See* Res. br. at 11. However, the record is completely clear that as of the time the order was issued the serious risk of prosecution existed not in one country, as in *Rogers*, but in two. The record is also clear that when the risk of prosecution was eliminated, responsive documents were immediately produced by the Bank. *See* Appendix A at 4a-5a.

In a further effort to avoid the application of the holding in *Rogers*, the respondent recites the statements of the district and circuit courts that the petitioner did not exercise good faith in attempting to comply with the subpoena. But it is just that conclusion which is the principal flaw in the decisions below. "Good faith" remained undefined, appearing to turn only on whether the witness achieves success in producing the documents, notwithstanding that production would necessitate criminal offenses in allied nations. Strenuous efforts in every jurisdiction, calculated only to procure the lawful release of the documents, were accorded no weight when measured against the "non-standard" seemingly applied to the petitioner and to others similarly situated. While the respondent may be

content with that state of legal disarray, this Court should not tolerate perpetuation of the existing confusion. The need for a precise declaration is especially important, given the accelerating incidence of "cross-border" subpoenas. *See* Petition at 10-11.

The respondent has addressed a similarly unpersuasive argument to the existing conflict in the circuit courts. In *United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983), the Seventh Circuit refused to compel the disclosure of documents, sought pursuant to an IRS summons, from Greece. Greek criminal law barred the release of such documents. Strangely, the respondent attempts to distinguish the inconsistent holding in the Seventh Circuit case on a basis that the respondent itself then repudiates: that one case involved a grand jury subpoena and the other an IRS summons. *See* Res. br. at 14, n. 11. The other distinctions raised by the respondent are of little moment in the context of the issues raised by this case. *See* Petition at 12-15. The point remains clear: the Seventh Circuit excuses production where foreign criminal law interferes; the Eleventh Circuit does not.

The interests of the *amici* have been demonstrated by their appearance in the courts below and their participation in this Court. Expression of these views to the executive branch is no longer appropriate and would, moreover, be meaningless in view of the fact that the executive branch's use of judicial power raises an essential issue in the case. When the propriety of exercising judicial power is in issue, the executive stands before the court as does any other litigant. Here, the respondent has failed to answer many of the reasons articulated by the petitioner and the *amici* for granting a writ of certiorari. The *amici*, including the governments of three close allies, have vigorously expressed their disagreement with the decisions below, but their views have received cursory dismissal from the respondent. For example, the Government of Canada has argued that the necessary meaning of the Eleventh Circuit decision is that an alien owes the United States a greater duty

of obedience than is owed to its own national government or to its host sovereign, even with respect to conduct outside of the United States.[5] *Brief of the Government of Canada as Amicus Curiae in Support of Petition for Writ of Certiorari* ("Can. br.") at 3.

Further, the *amici* have pointed out that established principles of international law prohibit one state, acting on the basis of the presence within its borders of a foreign national, from coercing disobedience of the applicable laws of another state. Can. br. at 3. The *amici* also point out that the decisions below conflict with analogous federal court decisions that excuse compliance with a grand jury subpoena when to do so would violate state law. *See, e.g., In re Hampers*, 651 F.2d 19 (1st Cir. 1981); *In re Cruz*, 561 F.Supp. 1042 (D. Conn. 1983); *In re Grand Jury Empanelled Jan. 21, 1981*, 535 F.Supp. 537 (D.N.J. 1982). These and other points are unanswered in the respondent's brief. The respondent has shown no "matter or ground" why these issues should not be reviewed and resolved by this Court.

The petitioner and the *amici* have identified an important issue. The dilemma of conflicting legal obligations facing a witness in the Bank's position is a matter affecting international relations, as the presence of the *amici* makes clear. It is more than a matter of one bank and one subpoena. Yet, on the flimsiest of grounds, respondent seeks to preclude review.

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5 In its argument, the respondent overlooks the express holding of the district court that the interest of the Cayman Islands in its criminal law is "vital." Appendix B at 14b. Without citation, the respondent proclaims its interest "superior." Res. br. at 12, n. 8; *see* § 40 of *Restatement (Second) of Foreign Relations of the United States* (1965).

II. THE FINE IS PUNITIVE

Following months of extensive, and ultimately successful, multi-national efforts by the Bank to comply with the subpoena in a lawful manner, the Bank was further burdened with a fine of $1,825,000. The respondent hopes to avoid review of the assessment of that fine, which bursts the limits of civil contempt, on the basis of the catch-words "fact-bound." However, uncontested evidence establishes that the fine was primarily punitive, in derogation of the purpose of civil contempt.

It is uncontested that by November 17, 1983, the Bank had produced documents from both the Cayman Islands and the Bahamas. Following additional searches, the Bank produced more documents on December 5, 1983. The December 5 production ended the period during which either party thought any documents remained outstanding.[6] As of that date, at the latest, the fine ceased to be coercive, and lost its character as a civil contempt fine. In late January 1984, the Bank found and produced four additional documents, which were carbon copies of previously produced documents, with slightly different markings that furnished no new information. *Compare* Appendix A, at 6a, with 9a. The Bank was fined $1,825,000, of which $1.3 million related solely to the four carbon copies.

Substantial compliance with the purgation conditions of civil contempt ends civil contempt. *Washington Metropolitan Area Transit Authority v. Amalgamated Transit Union*, 531 F.2d 617 (D.D.C. 1976). The uncontroverted evidence shows that the production of the four carbon copies provided no new information. Accordingly, the Bank had substantially complied no later than December 5, and its civil contempt—if any—had ended.

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6 The respondent states that on December 12, 1983 they disagreed with the Bank's assertion that production was complete. Res. br. at 17. That more documents existed cannot be inferred from the respondent's unwillingness during an oral argument to concede compliance. At no time after December 5, 1983 did the respondent question the completeness of the Bank's production.

Furthermore, regardless of the degree of compliance, the taking of all reasonable steps to comply with a contempt order ends the contempt. *United States v. Rizzo*, 539 F.2d 458 (5th Cir. 1976). The Bank searched repeatedly until no documents were thought to be outstanding. The fine may not continue after a party has taken such steps.[7]

The Federal Rules of Procedure prohibit the imposition of contempt penalties on a party that has an adequate excuse for non-compliance. Fed. R. Civ. P. 45(f); Fed. R. Crim. P. 17(g); *see* Appendices J, K. The Bank, having made an extensive search and having no knowledge of undiscovered documents, clearly had an adequate excuse for not continuing to search. Assessment of civil contempt fines after that time deprives petitioner of due process and is thus prohibited by law. Unless corrected, the decision below would abolish the distinction between civil and criminal contempt.

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7 The respondent misstates the record regarding the availability of a Bank representative to appear before the grand jury to authenticate the documents produced. Res. br. at 17. The record clearly reflects that the Bank's representative was available at all times after December 5. Record Excerpts Vol. II, tab B at 60.

CONCLUSION

The decisions below fail to identify any standard of conduct for the recipient of a subpoena calling for the cross-border production of documents. Furthermore, these decisions suggest that no amount of effort by a subpoena recipient can constitute "good faith" or furnish an "adequate excuse" with respect to the non-production of documents subpoenaed from a jurisdiction barring their release. If the law is that instant and perfect obedience to subpoenas is required, without regard to the penal consequences in other nations, that precept should be unambiguously articulated so that neutral record-keepers and others can appropriately conform their behavior.

The Court's intervention is also required to insure that the lower courts do not exceed the limits of their powers by imposing harsh and punitive fines in the guise of civil contempt.

Accordingly, this petition for certiorari should be granted.

Dated: New York, New York
December 10, 1984

Respectfully submitted,

/s/ Henry Harfield

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December 10, 1984

CERTIFICATE OF SERVICE

I, Henry Weisburg, a member of the Bar of this Court, certify that three copies of the annexed Reply Brief in Support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit have been served this ____ day of December, 1984, by mail, postage prepaid, upon the following counsel:

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